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HELEN G. STRICKLER and
ROY S. STRICKLER,
Appellants,

v.

WILLIAM K. YEATS, individually
and as administrator of the
estate of Elizabeth Gemmill,
deceased, et al.,
Appellees.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

309 I.A. 128

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Helen G. Strickler sought an accounting for the rental of a single-family residence from a co-tenant who was alleged to have taken and used the profits or benefits of the property in greater proportion than her interest. The master to whom the cause was referred found for plaintiff on the accounting in the sum of \$1,645. The chancellor sustained exceptions to the master's report, denied an accounting, and plaintiffs appeal.

The material facts adduced upon the hearing disclose that prior to 1915 Howard S. Gemmill, residing in Wilmette, Illinois, had been married to Nelle E. Gemmill. Helen G. Strickler was one of two children born of this marriage. Subsequent to Mrs. Gemmill's death in 1917 Howard Gemmill married Elizabeth Gemmill, and in 1926 the real estate in question, consisting of a single-family residence, was purchased from one Augusta Billings, Mr. Gemmill having paid the full purchase price from his own funds, and taken title in the name of his second wife, Elizabeth. In October, 1930, the premises were conveyed for a nominal consideration to William K. Yates, and he in turn reconveyed to Elizabeth Gemmill and Howard S. Gemmill, "as joint tenants and not tenants in common." The Gemmills resided in this home until November 8, 1930, when Mr. Gemmill became ill and as a result of disagreement with his wife went to live in the home of his daughter, Helen G. Strickler, the plaintiff, where he re-

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The material facts advanced upon the hearing disclose that prior to 1917 Howard S. Gemmill, residing in Wilmette, Illinois, had been married to Nellie E. Gemmill. Helen G. Strickler was one of no children born of this marriage. Subsequent to Mrs. Gemmill's death in 1917 Howard Gemmill married Elizabeth Gemmill, and in 1926 the estate in question, consisting of a single-family residence, was purchased from one Augusta Billings, Mr. Gemmill having paid the purchase price from his own funds, and taken title in the name of his second wife, Elizabeth. In October, 1930, the premises were conveyed for a nominal consideration to William K. Yates, and he in turn conveyed to Elizabeth Gemmill and Howard S. Gemmill, "as joint tenants and not tenants in common." The Gemmills resided in the home until November 8, 1930, when Mr. Gemmill became ill and as result of disagreement with his wife went to live in the home of his daughter, Helen G. Strickler, the plaintiff, where he re-

mained until his death December 13, 1932.

Gemmill had incurred an indebtedness to his daughter, Helen, of \$600, and December 3, 1930, he executed a quitclaim deed of all his interest in the homestead property to his daughter, Helen. Mrs. Gemmill was unaware of this conveyance and did not join in the deed, which was, however, recorded December 5, 1930. Thereafter Mrs. Gemmill continued to reside in the property and had exclusive possession thereof until her death, without issue, January 3, 1936.

The master found that February 1, 1931, plaintiff made a written demand upon Elizabeth Gemmill for that part of the rental value of the premises claimed to be due her as part owner, but that Mrs. Strickler never received anything from Mrs. Gemmill.

In February, 1936, defendant William K. Yates was appointed administrator of the estate of Elizabeth Gemmill, and in August of that year the present complaint was filed in the Circuit court for a partition of the real estate and for an accounting from the estate, alleging that Mrs. Gemmill had taken or used more of the benefits of the premises than her share subsequent to the date of plaintiff's deed, being for the period during which Mrs. Gemmill had the exclusive use of the property.

Thereafter a decree for partition was entered in the Circuit court and a sale was had under the decree. The cause was rereferred to the master to take the testimony of the parties as to an accounting, as specified in the decree, and he found that by virtue of the original decree plaintiff was entitled to one-half of the rental value of the real estate from February 1, 1931, until January 3, 1936, when Mrs. Gemmill died, amounting to \$1,645, for which he recommended that the estate of defendants should be held to account. He also disposed of other items between the parties not in dispute, reported a balance on hand of \$907.31, which he recommended should be applied on the item of \$1,645, leaving a deficit for the balance due plaintiff. No homestead was

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clusive possession thereof until her death, without issue, January

3, 1936.

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written demand upon Elizabeth Gemmell for that part of the rental

value of the premises claimed to be due her as part owner, but that

Mrs. Strickler never received anything from Mrs. Gemmell.

In February, 1936, defendant William K. Yates was appointed

administrator of the estate of Elizabeth Gemmell, and in August of

that year the present complaint was filed in the Circuit court for

a partition of the real estate and for an accounting from the estate,

alleging that Mrs. Gemmell had taken or used more of the benefits

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held to account. He also disposed of other items between the

parties not in dispute, reported a balance on hand of \$907.31,

which he recommended should be applied on the item of \$1,642,

leaving a deficit for the balance due plaintiff. No homestead was

mentioned in defendants' pleadings, and no evidence was presented relating to its value nor to the value of the land during the period from 1931 to 1936.

After the master's report on the accounting had been presented to the chancellor for consideration, defendants filed their motion for leave to amend their pleadings "for the sole purpose of specifically raising the question of the homestead rights of Elizabeth Gemmill as a defense to the claim of Helen G. Strickler for an accounting." The court allowed the motion, but heard no evidence, and defendants added an additional paragraph to their answer incorporating this defense. Plaintiff then filed a reply to the answer denying the right of homestead and the right of defendants to receive or demand \$1,000 or any other sum as a condition precedent to an accounting. The chancellor, without hearing any further testimony or ordering a rereference with respect to the homestead or land value, sustained the exceptions to the master's report and directed the master to pay to the heirs of Mrs. Gemmill the sum of \$907.31 remaining in his hands.

The principal question involved is whether Elizabeth Gemmill acquired the exclusive enjoyment of the homestead, rent free from 1931 to 1936, or whether she should be charged with rental for the excess in value over the \$1,000 homestead exemption provided by the statute. (Ill. Rev. Stats., 1939, chap. 52, par. 1, sec. 1.) Under the facts of the case, both Mr. and Mrs. Gemmill had a right of homestead in the property until he divested himself of his one-half interest in 1930. Thereafter the exclusive enjoyment of the homestead remained in Mrs. Gemmill, who continued to live in the premises. During the period from 1930 and until Mrs. Gemmill's death, plaintiff, as cotenant, had the right to extinguish Mrs. Gemmill's homestead right, as provided by statute, by tendering to her the value thereof. This was never done, and under the weight of authority in this state a surviving wife is entitled to the exclusive use of the homestead and rents and profits therefrom until the homestead is extinguished. (Ill. Rev. Stats., 1939, chap. 52, par. 2, sec. 2, Exemptions; chap. 68, par. 16, sec.

mentioned in testimony, and no evidence was presented relating to its value for the value of the land during the period from 1931 to 1936.

After the master's report on the accounting had been presented to the chancellor for consideration, defendants filed their motion for leave to amend their pleadings "for the sole purpose of specifically raising the question of the homestead rights of Elizabeth Gommill as a defense to the claim of Helen A. Steinhilber for an accounting." The court allowed the motion, but heard no evidence, and defendants added an additional paragraph to their answer incorporating this defense. Plaintiff then filed a reply to the answer denying the right of homestead and the right of defendants to receive or demand \$1,000 or any other sum as a condition precedent to an accounting. The chancellor, without hearing any further testimony or offering a reference with respect to the homestead or land value, sustained the exceptions to the master's report and directed the master to pay to the heirs of Mrs. Gommill the sum of \$200.00 remaining in his hands.

The principal question involved is whether Elizabeth Gommill acquired the exclusive enjoyment of the homestead, rent free from 1931 to 1936, or whether she should be charged with rental for the excess in value over the \$1,000 homestead exemption provided by the statute. (Ill. Rev. Stat., 1930, chap. 95, par. 1, sec. 1.) Under the facts of the case, both Mr. and Mrs. Gommill had a right of homestead in the property until he divested himself of his one-half interest in 1930. Thereafter the exclusive enjoyment of the homestead remained in Mrs. Gommill, who continued to live in the premises. During the period from 1930 and until Mrs. Gommill's death, Plaintiff, as co-tenant, had the right to extinguish Mrs. Gommill's homestead right, as provided by statute, by tendering to her the value thereof. This was never done, and under the weight of authority in this State a surviving wife is entitled to the homestead and its contents and rents and profits therefrom until she is deceased in intestate. Ill. Rev. Stat., 1930, chap. 95, par. 1, sec. 1, and 1930, chap. 95, par. 1, sec. 2.

16, Husband and Wife; chap. 30, par. 26, sec. 27, Conveyances.)

Counsel for defendants cite numerous cases defining the rights of a surviving wife under similar circumstances. (Bailey v. Hamilton, 337 Ill. 620, 621; Powell v. Powell, 247 Ill. 432; Goddard v. Landes, 250 Ill. 457.) The Powell case is precisely in point. In that case Ann Powell, wife of Patrick Powell, died intestate leaving her husband, several children and a granddaughter of her deceased son as her only heirs at law. At the time of her death she was the owner of a house and lot in Peoria, which had been occupied by her and her husband as a homestead. Several years prior to her death title to this property was in her husband, but he and his wife joined in a deed conveying the premises to their son, Daniel, who later reconveyed to his mother. After the death of Ann Powell her husband filed a bill in equity to set aside the deed to the son and the one from the son to his mother on the ground that Patrick Powell was not mentally competent to make a deed at the time he conveyed the property to his son, and he prayed in the alternative for the assignment of his homestead in the premises in case it was found that Ann Powell was the owner of the fee at the time of her death. The Circuit court of Peoria county entered a decree dismissing the bill upon the ground that the evidence showed that he was competent to make a deed, and from that decree Powell prosecuted an appeal, which was disposed of in Powell v. Powell, 240 Ill. 442. The Circuit court established the title in Ann Powell at the time of her death, but failed to dispose of the homestead rights of Patrick Powell, her husband. The Supreme Court approved of the finding of the Circuit court in so far as it found that Powell was competent to make a deed, but reversed and remanded the cause for the purpose of disposing of the homestead question which was involved. After the case was remanded the Circuit court made a reference to a master, who found Patrick Powell had been deprived of the use and enjoyment of his home and homestead, and that the value of that portion of it occupied without his consent was \$12 a month, and

16, husband and wife; class. 3d, par. 2d, sec. 17, Conveyances.)
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rights of a surviving wife under similar circumstances. (Earlier
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to a master, who found Patrick Powell had been deprived of the use
and enjoyment of his home and homestead, and that the value of that
portion of it occupied without his consent was \$12 a month, and

recommended that Powell be paid one-half of the rental value of the premises so occupied, or \$6 a month. One of the principal contentions made in that proceeding was that Powell was not entitled to occupy the premises in question as a homestead to the exclusion of the heirs of the deceased owner. This presented the legal question whether a surviving husband or wife under the homestead law has the right as against adult heirs to the exclusive occupancy of the homestead where it is not susceptible of division and is worth more than \$1,000. After reviewing the history of homestead legislation in this State, the court determined the litigation in Powell's favor, and held that the adult heirs would clearly have been entitled to extinguish Powell's homestead right by paying or tendering to him the value of his homestead estate; but having neither paid nor offered to pay Powell anything for his homestead, the trial court properly decreed that the adult heirs had no right to take possession of the house or any part of it and thereby exclude Powell therefrom. The court said (p. 439): "If appellants desire to extinguish the homestead, the rule announced in the authorities above cited provide a lawful procedure for such purpose. Until such proceedings are had and until the payment or tender to appellee of the value of his homestead, he is entitled to the exclusive enjoyment thereof, regardless of its value. While there has neither been a payment nor a tender of any sum to appellee for his homestead and the question is not directly in issue in this proceeding, still there is a sufficient discussion of the amount that ought to be paid to appellee to justify us in expressing our views upon that question, which we do controversy in order to enable the parties to make a final adjustment of this/ without further expense or litigation." (Italics ours.)

The foregoing decision and other cases cited in defendants' brief lead to the conclusion that under the precise situation the courts have granted to a surviving spouse the exclusive enjoyment of the homestead and rents and profits therefrom until the homestead is extinguished as provided by the statute, "regardless of its value."

recommended that Powell be paid one-half of the rental value of the premises so occupied, or \$2 a month. One of the principal contentions made in that proceeding was that Powell was not entitled to occupy the premises in question as a homestead to the exclusion of the heirs of the deceased owner. This presented the legal question whether a surviving husband or wife under the homestead law has the right as against adult heirs to the exclusive occupancy of the homestead where it is not susceptible of division and its worth more than \$1,000. After reviewing the history of homestead legislation in this State, the court determined the litigation in Powell's favor, and held that the adult heirs would clearly have been entitled to the English Powell's homestead right by paying or tendering to him the value of his homestead estate; but having neither paid nor offered to pay Powell anything for his homestead, the trial court properly decreed that the adult heirs had no right to take possession of the house or any part of it and thereby exclude Powell therefrom. The court said (p. 432): "If appellants desire to extinguish the homestead, the rule announced in the authorities above cited provides a lawful procedure for such purpose. Until such procedure has been had and until the payment or tender to appellee of the value of his homestead, he is entitled to the exclusive enjoyment thereof, regardless of his value. While there has neither been a payment nor a tender of any sum to appellee for his homestead nor the question is not directly in issue in this proceeding, still there is a sufficient discussion of the amount that ought to be paid to appellee to justify us in expressing our views upon that question, which we do in order to enable the parties to make a final adjustment of their rights without further expense or litigation." (Italics ours.)

The foregoing decision and other cases cited in the opinion are in full accord with the conclusion that under the present situation the courts have granted to a surviving spouse the exclusive enjoyment of the homestead and rents and profits therefrom until the homestead is exhausted as provided by the statute, "regardless of its value."

Plaintiff's counsel earnestly argues that if we should reach the conclusion herein stated, that nevertheless the cause should be reversed and remanded with directions to vacate the decree and rerefer the cause to the master to determine the value of the homestead, the value of the estate, and what interest of the plaintiff is subject thereto, and that an accounting be taken as to the rental value of the property during the years 1931 to 1936 and of the value of the whole property during those years; and that after allowing the administrator one-half of the rents, if plaintiff's estate be subject to a homestead of some value that the court allow defendants a further credit from the rents of such sum as the homestead value may bear to the total value of the premises, and that a decree be entered in favor of plaintiff for the difference between such sum and one-half the total rental value. In view of the conclusion reached in the Powell case, we think this contention is untenable, since the court there held that Powell was entitled to the exclusive enjoyment of the homestead right, "regardless of its value," unless payment or tender of the value of the homestead was made in extinguishment thereof. The same principles are applicable to the circumstances of this case.

We think the chancellor properly sustained defendants' exceptions to the master's report, and therefore the decree of the Circuit court is affirmed.

DECREE AFFIRMED.

Scanlan and Sullivan, JJ., concur.

THE COURT'S DECISION.

The Circuit Court is affirmed.

Exceptions to the master's report, and therefore the decree of

the court, are overruled.

are applicable to the circumstances of this case.

homestead was made in extinguishment thereof. The same principles

less of its value," unless payment or tender of the value of the

entitled to the exclusive enjoyment of the homestead right, "where-

reparation is demanded, then the value of the homestead shall be

in view of the conclusion reached in the former case, we believe this

the difference between each sum and one-half the total homestead value.

premise, and that a decree be entered in favor of plaintiff for

sum as the homestead value may bear to the total value of the

the court allow defendant a further credit from the rents of such

if plaintiff's estate be subject to a homestead of some value that

and that after allowing the administrator one-half of the rents,

1936 and of the value of the whole property during those years;

as to the rental value of the property during the years 1911 to

the plaintiff is subject thereto, and that an accounting be taken

of the homestead, the value of the estate, and what interest of

decree and reverse the cause to the master to determine the value

should be reversed and remanded with directions to reverse the

reason the conclusion herein stated, that notwithstanding the cause

plaintiff's counsel submitted evidence that it was shown

41282

RAYMOND GRATTAN,

Appellee,

v.

AHLBERG BEARING COMPANY,
a corporation,

Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

309 I.A. 128²

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for services alleged to have been rendered in procuring a manufacturing site for Ahlberg Bearing Company. In his original complaint he declared against Phipps Industrial Land Trust, the vendor, and J. H. Van Vlissingen & Co., the vendor's broker, joining a count in tort against Ahlberg Bearing Company for interfering with his making a commission. Before trial the suit was discontinued against the other defendants and proceeded against Ahlberg Bearing Company only for work and labor. From a verdict against defendant for \$6,000 plaintiff remitted \$1,000 and had judgment for \$5,000. Defendant thereupon prosecuted an appeal direct to the Supreme court of Illinois, on the theory that a constitutional question was involved. However, in an opinion rendered by that court in Grattan v. Ahlberg Bearing Company, 373 Ill. 455, jurisdiction was denied and the cause was transferred to this court for determination.

The cause proceeded to trial under plaintiff's third amended statement of claim, motions to strike the original and first and second amended statements of claim having been sustained by the court. Briefly stated, it is alleged that August 10, 1936, plaintiff had a conversation with C. J. Bender, president of Ahlberg Bearing Company, wherein Bender had requested him to procure, either through purchase or lease, a new industrial plant for defendant; that in accordance with this request plaintiff agreed orally to do so and performed certain work, labor and services in

11-10-38

NATIONAL TRADING

INC.

v.

ALIBERT BEARING COMPANY

a corporation

Illinois

309 I.A. 128

MR. JUSTICE BRIDGES, CHIEF JUSTICE OF THE COURT.

Plaintiff brought suit for services alleged to have been rendered in procuring a manufacturing site for Alibert Bearing Company. In his original complaint he declared against Briggs Industrial Land Trust, the vendor, and J. A. Van Vliet & Co., the vendor's broker, joining a count in tort against Alibert Bearing Company for interfering with his making a commission. Before trial the suit was discontinued against the other defendants and proceeded against Alibert Bearing Company only for work and labor. From a verdict against defendant for \$5,000 plaintiff remitted \$1,000 and had judgment for \$5,000. Defendant thereupon prosecuted an appeal direct to the Supreme Court of Illinois, on the theory that a constitutional question was involved. However, in an opinion rendered by that court in Alibert Bearing Company, 373 Ill. 475, jurisdiction was denied and the cause was transferred to this court for determination.

The cause proceeded to trial under plaintiff's third amended statement of claim, motions to strike the original and first and second amended statements of claim having been sustained by the court. Briefly stated, it is alleged that about 1930, plaintiff had a conversation with C. J. Barker, president of Alibert Bearing Company, wherein Barker had requested him to procure, either through purchase or lease, a new industrial plant for defendant, and to determine with this request plaintiff agreed orally to do so and performed certain work, later and rendered in

making a canvass of the city of Chicago to find a suitable site; that he procured and submitted to defendant various properties which were available for purchase or lease, and rendered various and sundry services in arranging meetings, trips of inspection, procuring plats, maps and writings, and holding many conferences with the various officers and agents of defendant, as well as with prospective vendors and lessors; that as the result of his efforts defendant purchased a site at 47th and Whipple streets, Chicago, which was among those procured by plaintiff and submitted to defendant in the course of his employment; that the fair and reasonable value of the services rendered by him was \$6,000, but that defendant refused to pay therefor and suit followed.

From the facts adduced upon the trial, it appears that defendant concluded a lease with option to purchase the site and building at 47th and Whipple streets in Chicago early in December, 1936. The lessors-vendors were the trustees of the Phipps Industrial Land Trust, represented exclusively by the brokerage firm of J. H. Van Vlissingen & Co. Part, but not all, of this site was under a lease to Marshall Field & Company, expiring April 30, 1939. As part of the transaction, Marshall Field & Company paid the vendors \$25,000 for a cancellation of the lease. Grattan had no part in these negotiations. They were conducted by Robert Winslow of the Van Vlissingen brokerage firm after defendant had seen and answered Van Vlissingen's advertisement in the Chicago Tribune of October 18, 1936. After the deal was agreed upon and its terms formulated in writing, plaintiff served on all the parties thereto, including Marshall Field & Company, a formal written notice that he claimed against all of them a broker's commission on the sale.

Plaintiff's business was that of a real estate appraiser. He had at various times been employed in this capacity by the Chicago Real Estate Board, the Home Owner's Loan Corporation, the Board of Assessors, and Sullivan Machinery Co. Early in August, 1936, his attention was first called to the manufacturing plant at

making a canvass of the city of Chicago to find a suitable site; that he procured and permitted to defendant various properties which were available for purchase or lease, and rendered various and sundry services in arranging meetings, trips of inspection, procuring plans, maps and notices, and holding many conferences with the various officers and agents of defendant, as well as with prospective vendors and lessors; that as the result of his efforts defendant purchased a site at 47th and Whipple streets, Chicago,

which was among those procured by plaintiff and admitted to defendant in the course of his employment; that the fair and reasonable value of the services rendered by him was \$25,000, but that defendant refused to pay therefor and suit followed.

From the facts adduced upon the trial, it appears that defendant contracted a lease with option to purchase the site and building at 47th and Whipple streets in Chicago early in December, 1936. The lessors-vendors were the trustees of the Whipple Insurance Land Trust, represented exclusively by the brokerage firm of J. R. Van Vliet & Co., Trust, but not all of this site was sold to defendant. As part of the transaction, defendant paid the vendors \$25,000 for a cancellation of the lease. Graham had no part in these negotiations. They were conducted by Robert Winlow of the Van Vliet brokerage firm after defendant had seen and answered Van Vliet's advertisement in the Chicago Tribune of October 12, 1936. After the deal was agreed upon and its terms formulated in writing, plaintiff served on all the parties thereto, including Graham & Co., a formal written notice that he claimed against all of them a broker's commission on the sale. Plaintiff's business was that of a real estate appraiser.

He had at various times been employed in this capacity by the Chicago Real Estate Board, the Real Estate Loan Corporation, the Board of Assessors, and Sullivan Machinery Co. Early in August, 1936, his attention was first called to the manufacturing plant at

47th and Whipple streets, Chicago. He had learned that the Ahlberg Bearing Company was looking for a manufacturing plant and wrote a letter offering his services, to which he had a reply asking him to call on Mr. Bender, the president, and Mr. McQuinn, the chief engineer. In the visit that ensued plaintiff offered property known as the Zerozone plant, which was owned by the Pullman Bank. As a result of plaintiff's suggestion there ensued a series of visits and conferences between plaintiff, defendant's officers and Donald O'Toole, representing the bank. These negotiations were fruitless, however, since the Zerozone building was sold to another purchaser, the parties having failed to agree upon satisfactory terms.

Plaintiff said on the hearing that after the negotiations for the Zerozone property had failed he had a conversation with Bender, September 2, 1936, wherein the latter deplored the loss of the deal, commiserated plaintiff because he did not get paid for his work, and told him to continue to seek a plant and that he would be paid for his services. Bender denied the conversation and the hiring.

In the course of the trial Bender testified that this conversation could not have taken place September 2, 1936, because he was in his home in McHenry, Illinois, during that time and until September 25, in constant attendance upon his wife who had suffered a paralytic stroke. Bender was corroborated by Mary Beatty, a neighbor, and by his daughter, Mrs. Fred Burkholder.

After defendant had rested, the court permitted plaintiff, over defendant's objection, to change his case in chief by shifting his dates one week back and by introducing as exhibits some sixteen purported listings which he claimed to have submitted to Bender. When defendant then recalled Bender to meet the revised evidence the court refused to allow further testimony. After both sides had rested, defendant moved to reopen the case to allow the presentation of newly discovered evidence. O'Toole, witness in chief for plaintiff, had testified to defendant's negotiations for the Zerozone plant.

47th and Chicago streets, Chicago. He had learned that the defendant
Hearing Company was looking for a manufacturing plant and wrote a
letter offering his services, to which he had a reply asking him to
call on Mr. Bender, the president, at 1212 Michigan, the chief engineer.
In the visit that ensued plaintiff offered property owned by the
Heronese plant, which was owned by the Hulsebach family, as a result
of plaintiff's suggestion there ensued a series of visits and con-
ferences between plaintiff, defendant's officials and Edward O'Boyle,
representing the bank. These visits and conferences were held, however,
since the Heronese building was sold to another purchaser, the par-
ties having failed to agree upon a satisfactory terms.
Plaintiff said on the hearing that after the negotiations
for the Heronese property had failed he had a conversation with
Bender, September 2, 1936, wherein the latter deplored the loss of
the deal, commented plaintiff because he did not get paid for
his work, and told him to continue to seek a plant and that he would
be paid for his services. Bender denied the conversation and the
fact.
In the course of the trial further testified that this con-
versation could not have taken place September 2, 1936, because he
was in his home in Kenosha, Illinois, during that time and until
September 25, in constant attendance upon his wife who had suffered
a paralytic stroke. Bender was corroborated by very heavily a
neighbor, and by his daughter, Mrs. Fred Winkler.
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purported listers which he claimed to have furnished to Bender, when
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defendant moved to reopen the case to allow the presentation of
newly discovered evidence. O'Boyle, witness in chief for plaintiff,
was testified to defendant's allegations for the Heronese plant.

On cross-examination he fixed the period as between June 1 and August 31, 1936, and testified that he thought it was finally sold to the Tuthill Brick Company in November, 1936. Application to reopen was on the ground that after the adjournment of court on the day of the rebuttal testimony defendant and its attorneys first learned that O'Toole and another witness, Orlando Montague, would testify that the negotiations with the Tuthill Brick Company for the sale of the Zerozone plant were not begun until September 23, 1936, and the accepted offer was made October 14, 1936; that previous to that date O'Toole was authorized and was willing and ready to negotiate a sale of it to defendant and that neither plaintiff nor defendant were ever advised to the contrary prior to October 14, 1936. In discussing these two circumstances, the Supreme court said that "the refusal to allow him (Bender) to testify again concerning matters already covered by his testimony, after defendant had rested and after plaintiff had rested in rebuttal, did not deprive defendant of a hearing," and that "the application to reopen does not allege O'Toole did not know of those alleged facts when he was cross-examined, but did not do so. As to Montague, his testimony would have been merely cumulative to that of O'Toole. Under such circumstances, the refusal to reopen the case did not deprive defendant of the right to be heard on that question." It was contended by defendant in its direct appeal to the Supreme court that the refusal of the trial court to allow Bender to testify again and the denial of the application to reopen the case had deprived defendant of the due process of law guaranteed under the constitution, and the foregoing observations of the Supreme court were made in passing upon and overruling these two contentions.

Defendant argues that the pleadings state no cause of action, that the evidence did not sustain plaintiff's claim, and that the judgment notwithstanding the verdict should be entered in favor of defendant, or that in the alternative the judgment be reversed

On cross-examination, for as it is the law, it is not a matter of course that I and
August 21, 1936, and testified that he showed it was finally
sold to the United Fruit Company in November, 1936. Application
to reopen was on the ground that after the adjournment of court
on the day of the rebuttal testimony defendant and his attorneys
first learned that the defendant had been sold to the United Fruit Company
and would testify that the defendant had been sold to the United Fruit Company
for the sale of the banana plant was not before the court.
23, 1936, and the accepted offer was made October 14, 1936; that
previous to that date O'Loe was authorized and was willing and
ready to negotiate a sale of it to defendant and that neither
plaintiff nor defendant were ever advised of the contrary prior to
October 14, 1936. In discussing these two circumstances, the
Supreme Court said that "the refusal to allow him (Montague) to
testify again concerning matters already covered by his testimony,
after defendant had rested and after plaintiff had rested in re-
buttal, did not deprive a defendant of a hearing," and that "the
application to reopen does not allege O'Loe did not know of these
alleged facts when he was cross-examined, but did not so say. As to
Montague, his testimony would have been merely cumulative to that
of O'Loe. Under such circumstances, the refusal to reopen the
case did not deprive defendant of the right to be heard on that
question." It was contended by defendant in the direct appeal to
the Supreme Court that the refusal of the trial court to allow
defendant to testify again and the denial of the application to reopen
the case had deprived defendant of the due process of law guaranteed
under the constitution, and the four other provisions of the
supreme court were made in passing upon and overruling these two
contentions.

Defendant argues that the plaintiff's failure to state of action,
that the evidence did not establish plaintiff's claim, and that the
judgment notwithstanding the verdict should be entered in favor of
defendant, or that the affirmative defense be proved.

and the cause remanded for a new trial. The record is replete with contradictions, and it would serve no useful purpose to discuss and review the evidence of the many witnesses that testified and the numerous exhibits that were offered in evidence. It is fairly clear, however, that plaintiff, admittedly not a licensed real estate broker, had conferences with Bender and other officials of Ahlberg Bearing Company with respect to finding a manufacturing site for defendant, that he submitted various properties and was in some way instrumental in calling defendant's attention to the site finally agreed upon, at 47th and Whipple streets, by means of advertisements which he inserted in the weekly advertising sheet of the Chicago Real Estate Board, of which he was a member. He was evidently engaged to render services, and had numerous conversations with officials of defendant other than Bender in the course of these negotiations. No basis for compensation was ever discussed with Bender, and since plaintiff was not a licensed broker and does not claim commission as such, the only basis upon which he would be entitled to compensation would be under an implied contract and for the reasonable value of the services he rendered. He claims to have devoted 100 days in helping to consummate this deal, including a considerable period during which he devoted his efforts solely to the Zerozone property. It is clear, however, that the services rendered by plaintiff occupied no more than about thirty days in and around August and September of 1936. His first conversation with Bender took place late in August of that year, and plaintiff himself testified that Mr. Burkholder told him October 1, 1936, that defendant had narrowed its search for a manufacturing plant to three properties submitted, one of which was the plant at 47th and Whipple streets. Plaintiff says that he thereafter continued his efforts and negotiations until about October 10 or 12, when pursuant to brief conversations had with officials of the company he was told there was nothing more to be done, and the time from

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and Whipple streets. Plaintiff says that he thereafter continued
his efforts and negotiations until about October 10 or 12, when
he was told there was nothing more to be done, and the time from

then on until December 1 is characterized by plaintiff, himself, as "a period of lull." From these facts it appears that plaintiff's efforts were substantially ended about October 1. At that time the Whipple street property had been submitted, together with plats, figures and other details, and the officials of the Ahlberg Bearing Company had inspected the premises and had had negotiations with the vendor's brokers as to terms. It then became a question simply as to whether this plant or one of the other two properties under consideration should be decided upon by defendant. Nothing of importance transpired after October 1 or during the month of November for which plaintiff could fairly claim compensation. He testified that a reasonable figure for his services would be \$50 per diem, and no countervailing proof was offered. Taking his testimony at face value, we think that his compensation should not exceed \$50 a day for a period of thirty days, or \$1,500. Van Vlissingen & Company, brokers for the lessors, which negotiated the entire transaction with defendant, received only \$2,000 for their services.

Therefore, if plaintiff is willing to consent to a remittitur of \$3,500 within ten days, judgment will be entered here in his favor for \$1,500. Otherwise, judgment will be reversed ^{cause} and remanded for a new trial.

AFFIRMED UPON REMITTITUR OF \$3,500 BY
PLAINTIFF WITHIN TEN DAYS, IN WHICH CASE
JUDGMENT HERE FOR PLAINTIFF FOR \$1,500;
OTHERWISE JUDGMENT REVERSED AND CAUSE
REMANDED.

Scanlan and Sullivan, JJ., concur.

then on until December 1 is characterized by Plaintiff, himself, as "a period of ill." From these facts it appears that Plaintiff's efforts were substantially ended about October 1. At that time the Whipple street property had been annexed, together with other figures and other details, and the officials of the Whipple Building Company had inspected the premises and had had negotiations with the vendor's brokers as to terms. It then became a question simply as to whether this plant or one of the other two properties under consideration should be decided upon by defendant. Nothing of importance transpired after October 1 or during the month of November for which Plaintiff could fairly claim compensation. He testified that a reasonable figure for his services would be \$50 per day, and no countervailing proof was offered. Taking his testimony at face value, we think that his compensation should not exceed \$50 a day for a period of thirty days, or \$1,500. Van Vliet's transaction with defendant, received only \$2,000 for their services. Therefore, if Plaintiff is willing to consent to a judgment of \$1,500 within ten days, judgment will be entered here in his favor for \$1,500. Otherwise, judgment will be reversed and remanded for

AN ORDER OF THE COURT OF \$1,500 BY
 PLAINTIFF WITHIN TEN DAYS, IN WHICH CASE
 JUDGMENT SHALL BE REVERSED FOR \$1,500.
 OTHERWISE JUDGMENT REVERSED AND REMANDED.
 REVEREND

entered and attested, this 10th day of November.

41293

DELLOS REED, a minor, by
HARRY E. REED, his father and
next friend,

Appellant,

v.

CITY OF CHICAGO, a Municipal
corporation,

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

309 I.A. 129

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Delos Reed, who resided in Rensselaer, Indiana, but was attending the Hemphill Diesel School, Chicago, stumbled on a piece of concrete which had fallen on the sidewalk on Larrabee street near the school premises and broke his leg. He brought suit by his father and next friend for damages. Trial by jury resulted in a verdict and judgment in his favor for \$425, from which the city appeals.

The accident occurred September 8, 1938, shortly after 11 o'clock in the evening. Reed, then nineteen years of age, was walking in a northerly direction on the west side of Larrabee street. The city had been repairing the street north of Armitage avenue, and its employees had taken the concrete, macadam and stones from the street and placed them in piles along the curb. Plaintiff had been attending the Hemphill Diesel School for about a week, and had passed this particular spot approximately eight or ten times prior to the accident. On the night in question he left the school about 8 o'clock to attend a moving picture theatre, and as he passed the site of the accident he noticed the concrete and stones piled along the curb. After leaving the theatre, Reed and two companions were returning to the school at 2020 N. Larrabee street. At a point between Armitage avenue and the school he stumbled upon a piece of concrete which was on the sidewalk and sustained the injury of which he complains.

As ground for reversal the city urges three points: (1) that the statutory notice served by plaintiff was insufficient

and not in compliance with the statute; (2) that plaintiff failed to show that the proximate cause of his injury was the act or omission by defendant or its agent or employees; and (3) that plaintiff was not in the exercise of ordinary care for his own safety ^{before} or at the time of the accident, and was therefore guilty of contributory negligence.

With reference to the first contention it appears that September 20, 1938, plaintiff notified the city in writing that he was about to bring action against it for the recovery of damages on account of personal injuries sustained by him, and among other information contained in the notice he advised the city that "the accident by which I received such personal injuries *** occurred on the sidewalk in front of the address commonly known as 2020 Larrabee street, Chicago, Illinois." The Hemphill Diesel School is at the foregoing address and has a frontage on Larrabee street of approximately 100 feet. Although there is some conflict in the evidence as to just where the accident occurred it is fairly clear from the evidence adduced by several witnesses that it took place approximately 25 feet south of the school. The city contends that plaintiff's notice is not a sufficient compliance with the requirements of the statute, which requires that the notice shall contain "the place and location where such accident occurred;" that the provisions of the statute are jurisdictional and a signe qua non to recovery and failure of compliance with any of the essential elements of the statutory notice requires dismissal of the suit.

It may be conceded that the statutory notice is mandatory and a condition precedent to the maintenance of the suit for personal injury against the city, but the courts of this state have held that the purpose of the notice is to enable the city to locate the place of the injury with a view of preparing a defense, if a defense is necessary; that the requirements of the notice should receive a liberal construction in consonance with its purpose, and that if the notice directs the attention of the city officials with reasonable

certainly to the place of the accident, the requirements of the statute are met. In McComb v. City of Chicago, 263 Ill. 510, the court considered the question of the sufficiency of the notice locating the place of the injury as "at or near the corner of 39th street and Campbell avenue," and held the notice to be in compliance with the statute. In that case, however, the police removed the injured person in an ambulance from the site of the accident fixed by their report as the location of the same, and, in commenting upon the circumstances the court said that "it was not intended that the terms of the notice should be used as a stumbling block or pitfall to prevent recovery by meritorious claimants."

In Simon v. City of Chicago, 263 Ill. App. 656 (abst), the city was notified that plaintiff had been injured while riding in a taxicab "upon and along Roman avenue, at or near Roosevelt road," by reason of a certain hole in the street, and we held that this notice was sufficient.

The close proximity of the accident in the case at bar to the address given in the notice furnished the city with sufficient information to make an investigation. The repairs being made on the street covered only about 150 feet, and the rocks and concrete from the broken pavement were placed in several piles along the curb in close proximity to the Hemphill School. Any of the city's agents seeking to ascertain these facts would have had no difficulty in locating the place of the accident, and therefore we think the notice was a sufficient compliance with the statute.

It is next urged that plaintiff failed to adduce any evidence upon which the jury could have found that the city was negligent. Several witnesses testified on plaintiff's behalf, the first being Stanley R. Lindberg, an accountant and office manager for the Hemphill school. He said that the school is north of the intersection of Armitage avenue and Larrabee street; that the rocks and concrete piled along the sidewalk by the city's agents extended from approximately the curb of the street to the inner sidewalk; that the

certainly be the place of the accident, the requirements of the statute are met. In Johnson v. City of Memphis, 203 Ill. 410, 416, the court considered the question of the sufficiency of the notice locating the place of the injury as "at or near the corner of Third Street and Campbell Avenue," and held the notice to be in compliance with the statute. In that case, however, the police removed the injured person in an ambulance from the site of the accident immediately after their report as the location of the same, and, in commenting upon the circumstances the court said that "it was not intended that the form of the notice should be used as a standing block or shield to prevent recovery by meritorious claimants."

In Johnson v. City of Memphis, 203 Ill. 410, 416, 417, the city was notified that plaintiff had been injured while riding in a taxicab "upon and along Owen Avenue, at or near Roosevelt Road," by reason of a certain hole in the street, and we hold that such notice was sufficient.

The close proximity of the accident in the case at bar to the advice given in the notice furnished the city with sufficient information to make an investigation. The repairs being made on the street covered only about 100 feet, and the rocks and concrete from the broken pavement were placed in several piles along the curb in close proximity to the Campbell School. Any of the city's agents seeking to ascertain those facts would have had no difficulty in locating the place of the accident, and therefore we think the notice was a sufficient compliance with the statute.

It is next urged that plaintiff failed to obtain any evidence upon which the jury could have found that the city was negligent. Several witnesses testified on plaintiff's behalf, the first being Stanley A. Lindberg, an accountant and office manager for the Memphis school. He said that the school is north of the intersection of Avalon Avenue and Larabee Street; that the rocks and concrete piled along the sidewalk by the city's agents extended from approximately the curb of the street to the inner sidewalk; that the

sizes of the various pieces of cement or macadam were about a foot or more square, "a little bit too heavy to pick up;" and that this condition had existed for about five weeks prior to the date of the accident. The evidence with respect to the lighting of the street was not very clear. The record discloses there was a drug store on Armitage avenue, then a tavern, then the school. There was considerable light on the corner, which is some 150 feet or more from the site of the accident, and one or two street lights intervening.

Another witness, Richard Wetstein, also a student at the school, was walking with Reed when he stumbled, and he testified that the sidewalk on the west side of Larrabee street had several piles of broken concrete which had been dug out from the street. He said "they dug large holes there in the street, evidently to repair the street, and just throwing it up on the sidewalk. Most of the pieces of concrete were pretty good size. I would say from about 6 inches square and larger." He said the accident happened about 35 feet north of the corner of Larrabee and Armitage, and that the piles of concrete had been there for some time prior to the accident; that several pieces had rolled or fallen clear across the sidewalk; and that "there was not in that particular spot any red lights, fences or anything like that, around that pile to give warning of its presence."

Plaintiff testified that the accident occurred about forty feet north of Armitage avenue; that there were pieces of concrete, ranging in size from 6 inches or 8 inches up, which had been strewn about the sidewalk, and "there were a few piles, I do not remember how many, along the edge of the curb. Some of the pieces of debris and concrete were strewn across the width of the sidewalk itself. I noticed this piece of concrete that I stumbled on when I was being helped up. It was about 6 inches or 8 inches square. There were no lanterns or warnings of any kind of this condition." There is evidence that some red signal or warning lights were placed in the street, but none along the curb or on the sidewalk.

... of the various pieces of concrete or masonry which were about 1 foot or more square, as little as 1 foot long, and 1 foot wide. The condition had existed for about five weeks prior to the date of the accident. The evidence with respect to the location of the accident was not very clear. The record discloses there was a fire station on Bridge Avenue, then a tavern, then the school. There was considerable light on the corner, which is some 150 feet or more from the site of the accident, and one or two street lights further west.

Another witness, Richard Webster, also a student at the school, was walking with them when he happened, and he testified that the sidewalk on the west side of Bridge Avenue had several pieces of broken concrete which had been dug out from the street. He said "they dug large holes in the street, evidently to repair the street, and just throwing it up on the sidewalk. Most of the pieces of concrete were pretty good size. I would say from about 6 inches square and larger." He said the accident happened about 35 feet north of the corner of Bridge and Bridge, and that the pieces of concrete had been there for some time prior to the accident; that several pieces had rolled on fallen clean across the sidewalk; and that "there was not in that particular spot any red lights, lanterns or anything like that, around that pile to give warning of its presence."

... (The witness testified that the accident occurred about forty feet north of Bridge Avenue; that there were pieces of concrete, ranging in size from 6 inches or 8 inches up, which had been thrown about the sidewalk, and there were a few holes. I do not remember how many, along the edge of the curb. Some of the pieces of debris and concrete were thrown across the width of the sidewalk itself. I noticed this piece of concrete that I stumbled on when I was being helped up. It was about 8 inches or 8 inches square. There were no lanterns or warnings of any kind of this condition." There is evidence that some red light or warning lights were placed in the street, but none along the curb.

The city argues that children playing in the neighborhood might have caused pieces of concrete to fall over and upon the sidewalk, and it is urged that this would constitute an intervening cause, tending to relieve the city of liability. This contention is untenable, however, because the evidence showed that the dangerous condition of the sidewalk had existed for several weeks before the accident, and the city, foreseeing the danger of permitting these piles of debris to remain upon the sidewalk, should have protected pedestrians, who were rightfully upon the sidewalk, from the danger.

The remaining contention is that plaintiff was not in the exercise of ordinary care for his own safety and was, therefore, contributorily negligent. This contention is predicated upon the fact that plaintiff had passed along this sidewalk some **eight** or ten times before the accident, knew that work was being done in the street, and should have guarded himself against it. However, the evidence does not disclose the presence of any rocks or concrete blocks on the sidewalk when plaintiff last passed the site of the accident, and he was under no obligation to search out the defects but had the right to assume that the sidewalk would be in reasonably safe condition for travel. In Graham v. City of Chicago, 346 Ill. 638, the court said: "To hold a person absolutely bound to keep his eyes fixed upon the sidewalk in search of defects and dangerous places would be to establish a manifestly unreasonable and impracticable rule." Furthermore, rocks and concrete piled among the curb and sidewalk were not permanent defects, and it is conceivable that they could be readily disturbed from time to time, so as to constitute danger to pedestrians. There is nothing in the evidence to show that plaintiff knew that pieces of concrete had fallen over onto the sidewalk between the time that he last walked along this path and the time of the accident.

The court's instructions to the jury defined negligence and contributory negligence, and fully covered all the contingencies of

The city argues that Plaintiff's negligence in the accident might have caused a person to be injured or killed upon the sidewalk, and it is argued that this would constitute an intervening cause, tending to relieve the city of liability. This contention is untenable, however, because the evidence shows that the dangerous condition of the sidewalk had existed for several weeks before the accident, and the city, foreseeing the danger of permitting these places of debris to remain upon the sidewalk, should have protected pedestrians, who were rightfully upon the sidewalk, from the danger. The remaining contention is that Plaintiff was not in the exercise of ordinary care for his own safety and was, therefore, contributorily negligent. This contention is precluded upon the fact that Plaintiff had passed along this sidewalk some eight or ten times before the accident, knew that work was being done in the street, and should have avoided it, and it is, however, the evidence does not disclose the presence of any work or construction blocks on the sidewalk when Plaintiff last passed the site of the accident, and he was under no obligation to search out the defects but had the right to assume that the sidewalk would be in reasonably safe condition for travel. In James v. City of Chicago, 144 Ill. 632, the court said: "to hold a person absolutely bound to keep his eyes fixed upon the sidewalk in search of defects and dangerous places would be to establish a practically impossible and impracticable rule." Furthermore, notices and contracts filed along the curb and sidewalk were not permanent fixtures, and it is conceivable that they could be readily removed from time to time, so as to create a danger to pedestrians. There is nothing in the evidence to show that Plaintiff knew that blocks of concrete had fallen over onto the sidewalk between the time that he last walked along this path and the time of the accident.

The court's instructions to the jury defined negligence and contributorily negligence, and fully covered all the considerations of

the case. No complaint is made of the instructions nor of any ruling on the evidence. The case was fairly tried and under the instructions the questions of negligence and contributory negligence were fairly presented to the jury. We think plaintiff adduced sufficient proof both as to the city's negligence and as to his care for his own safety, to make a *prima facie* case and to warrant a submission of the facts to the jury. The judgment of the Municipal court should be affirmed and it is so ordered.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

the case, we concluded in favor of the defendant and we say so on the evidence, the case was fairly tried and heard the law was stated the questions of negligence and contributory negligence were fairly presented to the jury. We think slightly against the defendant's proof both as to the driver's negligence and as to his case for his own safety, to make a prima facie case and to warrant a submission of the facts to the jury. The judgment of the municipal court should be affirmed and it is so ordered.

W. H. H. H.

W. H. H. H.

41305

SOPHIE NOWICKI, also known as
Zofia Nowicki, and ANNA ZBYLUT,
survivor of Anna and John Zbylut,
Appellees,

v.

METROPOLITAN STATE BANK, a cor-
poration, and SOPHIE KUCZEK
NOWICKI,
Defendants.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

309 I.A. 130

SOPHIE KUCZEK NOWICKI,
Appellant.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Sophie Nowicki and Anna Zbylut filed a complaint in equity against Sophie Kuczek Nowicki, stepmother of Sophie Nowicki, who bears the same name as complainant, and the Metropolitan State Bank, seeking a decree requiring Mrs. Nowicki to turn over to her stepdaughter a certain bank book and upon the presentation thereof by plaintiff to the Metropolitan State Bank that the bank be required to pay over to Sophie Nowicki the amount found to be due her upon an accounting from defendants. Decree was entered as prayed for in the complaint, and Mrs. Nowicki alone prosecutes this appeal.

The salient facts disclose that Sophie Nowicki is a stepdaughter of defendant, Mrs. Nowicki, and was born November 26, 1917. Her father, John Nowicki, the husband of the defendant, Mrs. Nowicki, died January 4, 1927, owning certain real estate in joint tenancy with defendant. After her father's death Sophie lived with and was cared for and supported by her aunt and uncle, Anna and John Zbylut. John Zbylut has since died. Before the death of Sophie's father, he had on numerous occasions said that he wanted the real estate sold after his death and the proceeds divided among his four children, of whom Sophie was one. After his death Mrs. Nowicki sold the real estate, as she had been requested to do, and divided the pro-

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ceeds into four equal parts of approximately \$500 each. One of these parts was deposited in the Metropolitan Bank of Chicago on September 20, 1927, and the account was opened in the name of Sophie Nowicki, a minor, by John and Anna Zbylut, subject to the following indorsement upon the records of the bank: "This money is deposited by her stepmother, Mrs. Nowicki, and is not to be withdrawn by Sophie Nowicki until she becomes of age, unless for necessities by her aunt and uncle, John and Anna Zbylut." Following the opening of this savings account for her stepdaughter, Mrs. Nowicki gave the pass book to John and Anna Zbylut, Sophie's uncle and aunt respectively, who retained it in their possession continuously until June, 1928, when Anna Zbylut went to Indiana. Before leaving Chicago she gave the pass book to Mrs. Nowicki for safekeeping until Anna should return to Chicago. January 10, 1928, Sophie's aunt and uncle withdrew from her savings account the sum of \$35, for medical expenses incurred on Sophie's behalf. When her aunt Anna returned to Chicago in March, 1929, Mrs. Nowicki refused to return the pass book to her. Later, June 23, 1932, Mrs. Nowicki withdrew \$100 from Sophie's account. This withdrawal was made without Sophie's knowledge or consent or that of either uncle or aunt.

June 25, 1938, Sophie filed a suit in the Municipal court against the bank, asking payment of the original deposit and interest, less the \$35 which had been withdrawn for her benefit by her aunt and uncle. She had been told by the bank that Sophie's stepmother was also making some claim to the fund, that the pass book was in her stepmother's possession, and therefore the bank would not recognize any proceeding unless Mrs. Nowicki were made a party to it. Thereupon, by amendment, plaintiff made Mrs. Nowicki an additional party defendant. Upon trial of the cause in the Municipal court in January, 1939, there was a finding of the issues against plaintiff and judgment entered on the finding for defendants, for costs.

ceded into four equal parts of approximately \$250 each. One of these parts was deposited in the Metropolitan Bank of Chicago on September 20, 1937, and the account was opened in the name of Sophie Nowicki, a minor, by John and Anna Eby, subject to the following indorsement upon the records of the bank: "This money is deposited by her stepmother, Mrs. Nowicki, and is not to be withdrawn by Sophie Nowicki until she becomes of age, unless for necessities by her aunt and uncle, John and Anna Eby." Following the opening of this savings account for her stepdaughter, Mrs. Nowicki gave the pass book to John and Anna Eby, Sophie's uncle and aunt respectively, who retained it in their possession continuously until June, 1938, when Anna Eby went to Indiana. Before leaving Chicago she gave the pass book to Mrs. Nowicki for safekeeping until Anna should return to Chicago. January 10, 1939, Sophie's aunt and uncle withdrew from her savings account the sum of \$35, for medical expenses incurred on Sophie's behalf. When her aunt Anna returned to Chicago in March, 1939, Mrs. Nowicki refused to return the pass book to her. Later, June 23, 1939, Mrs. Nowicki withdrew \$100 from Sophie's account. This withdrawal was made without Sophie's knowledge or consent or that of either uncle or aunt.

June 28, 1938, Sophie filed a suit in the Municipal Court against the bank, asking payment of the original deposit and interest, less the \$35 which had been withdrawn for her benefit by her aunt and uncle. She had been told by the bank that Sophie's stepmother was also making some claim to the fund, that the pass book was in her stepmother's possession, and therefore the bank would not recognize any proceeding unless Mrs. Nowicki made a party to it. Thereupon, by amendment, plaintiff made Mrs. Nowicki an additional party defendant. Upon trial of the case in the Municipal Court in January, 1939, there was a finding of the issues against plaintiff, and judgment entered on the finding for defendants, for costs.

Thereafter Sophie and her aunt, her uncle having since died, instituted this proceeding in equity. The complaint alleged substantially the foregoing facts, and set forth that her suit in the Municipal court had resulted in findings of the issues against her and the entry of judgment by the court for costs for defendants. It is alleged that the proceeding in the Municipal court and the judgment there entered was a nullity, for the reason that plaintiff did not have an adequate remedy therein, and could not, as one claimant to a common fund, attempt to file and sustain a bill of interpleader in a common law court; that the proceeding in the Municipal court, and the judgment there entered, could not and did not adjudicate completely and finally the claims and rights of all the parties, and that the judgment was merely one for costs in favor of defendants against plaintiff, and was of no force and effect beyond the item of costs; and she asked that the chancellor make a complete and final adjudication between all the parties, that an accounting be had of the funds remaining in her account, that Mrs. Nowicki be required to surrender and deliver to plaintiffs the pass book and thereupon upon presentment thereof by plaintiffs to the Metropolitan State Bank, that it be required to pay over the full amount of the funds shown upon an accounting to be due plaintiffs.

May 5, 1939, Mrs. Nowicki filed a motion to dismiss the equity proceeding, averring that the cause of action alleged in the complaint was barred by the prior judgment rendered in the Municipal court; and she averred that because it does not wholly appear from the face of the complaint that the cause of action is barred by prior judgment, the affidavit of Honorable Edward P. Luczak, the judge who heard the case in the Municipal court, was attached to the motion for dismissal of the complaint, to supply a statement of the issues tried in the Municipal court, and the finding and judgment of the court at the conclusion of the hearing.

Plaintiffs filed an answer to the written motion of Mrs.

Thereafter, the same was done, but the same having since
also, introduced into the proceedings in equity. The complaint alleged
substantially the following facts, and set forth that the same
the municipal court had rendered the finding of the law against
her and the entry of judgment by the court for costs for defendant.
It is alleged that the proceeding in the municipal court and the
judgment there entered was a nullity, for the reason that plaintiff
did not have an adequate remedy at law, and could not, as one
claimant to a common fund, attempt to file and establish a bill of
interpleader in a common law court; that the proceeding in the
municipal court, and the judgment there entered, could not and did
not adjudicate completely and finally the claims and rights of all
the parties, and that the judgment was merely one for costs in favor
of defendant against plaintiff, and was of no force and effect
beyond the limit of costs; and the finding that the complaint seeks a
complete and final adjudication between all the parties, that an
accounting be had of the funds remaining in the account, that the
proceedings be required to be suspended and delivery to plaintiff the same
book and thereupon upon presentation thereof by plaintiff to the
Metropolitan State Bank, that it be required to pay over the full
amount of the funds shown upon an accounting to be due plaintiff.
May 2, 1919, Mrs. [Name] filed a motion to dismiss the
equity proceeding, averring that the cause of action alleged in the
complaint was barred by the prior judgment rendered in the municipal
court; and she averred that because it does not really come from
the face of the complaint that the cause of action is barred by prior
judgment, the court of equity should not grant the motion.
She bears the case in the municipal court, was attached to the motion
for dismissal of the complaint, to supply a statement of the reasons
therein in the municipal court, and the finding and judgment of the
court as to the validity of the motion.

Plaintiff filed an answer to the written motion of Mrs.

Nowicki to dismiss, which again alleges that the equity proceeding is not barred by the prior judgment for the reason that the judgment was rendered by a court not having jurisdiction of the subject matter, and that the judgment was therefore of no legal force and effect, except as a judgment for court costs in favor of defendants; that the matters averred in Mrs. Nowicki's motion to dismiss were irrelevant, immaterial and improper, for the reasons that the issues, the action of the litigants, their counsel, the findings and the judgment of the court are a matter of record in the files and transcript of proceedings of said cause in the Municipal court, which speak for themselves, but are not otherwise presented in the motion; that the affidavit of Judge Luczak, in support of the motion, is likewise irrelevant, immaterial and improper, for the reason that the issues, the action of the litigants, their counsel, the findings and the judgment of the court are matters of record in the files and transcript of the proceedings of said cause, which speak for themselves, and that any comments or opinions of the judge outside of the record are dictum and form no part of the finding or judgment of the court.

After argument of counsel, the chancellor overruled Mrs. Nowicki's motion to dismiss the complaint, and thereafter, December 20, 1939, ordered her to file an answer within two days. This she failed or refused to do, and accordingly an order of default was entered against her, taking the complaint as confessed, and March 8, 1940, the decree appealed from was entered.

The gravamen of the contention made by Mrs. Nowicki is that Municipal court had jurisdiction of the subject matter of the action, and no equitable claims or defenses having been presented by the pleadings in the Municipal court, her motion to dismiss the equity proceeding was proper on the ground that the judgment of the Municipal court was ^abar thereto and that it was likewise proper to present the affidavit of Judge Luczak in support of her motion for the purpose of

Nowicki to dismiss, which again alleges that the equity proceeding is not barred by the prior judgment for the reason that the judgment

was rendered by a court not having jurisdiction of the subject

matter, and that the judgment was therefore of no legal force and effect, except as a judgment for costs in favor of defendants;

that the matters averred in Mrs. Nowicki's motion to dismiss were irrelevant, immaterial and improper, for the reasons that the issues,

the action of the litigants, their counsel, the findings and the judgment of the court are a matter of record in the files and trans-

cript of proceedings of said case in the Municipal court, which speak for themselves, but are not otherwise presented in the motion;

that the affidavit of Judge Lucas, in support of the motion, is

likewise irrelevant, immaterial and improper, for the reason that the issues, the action of the litigants, their counsel, the findings

and the judgment of the court are matters of record in the files and transcript of the proceedings of said case, which speak for them-

selves, and that any comments or opinions of the Judge outside of the record are dicta and form no part of the finding or judgment of the court.

After argument of counsel, the Chancellor overruled Mrs.

Nowicki's motion to dismiss the complaint, and thereafter, December 20, 1939, ordered her to file an answer within two days. This she

failed or refused to do, and accordingly an order of default was

entered against her, taking the complaint as confessed, and March 6, 1940, the decree appealed from was entered.

The reversion of the contention made by Mrs. Nowicki is that Municipal court had jurisdiction of the subject matter of the action,

and no equitable claims or defenses having been presented by the

pleadings in the Municipal court, her motion to dismiss the equity proceeding was proper on the ground that the judgment of the Municipal

court was ^abar thereto and that it was likewise proper to present the affidavit of Judge Lucas in support of her motion for the purpose of

showing what the pleadings and issues were in the Municipal court. Whatever merit there might otherwise be to this contention, the rule is clearly established that a party pleading a former suit in bar is required to present to the court a full transcript of the proceedings, showing the pleadings, the issues involved, the rulings of the court thereon, and the findings and judgment entered therein. It is only upon the face of a complete record that a court can determine whether the contention that the second suit is barred by a prior judgment can be effectively determined. In the case at bar, Mrs. Nowicki failed to make such a showing, and the affidavit of the trial judge cannot be held to supply matters shown of record and which are contained in the files and transcript of proceedings of the cause. We think the court properly disregarded the affidavit of the Municipal court judge, and without it the record presented on the motion to dismiss is fatally defective.

It is earnestly argued by plaintiffs that the Municipal court judgment is not conclusive because the court had no jurisdiction to hear and determine an interpleader case affecting the equities of the parties, and that the second suit involves a different question or claim which the Municipal court did not and could not adjudicate, and a considerable portion of the briefs of both parties is devoted to this question. However, in the view we take, it is unnecessary to enter into a discussion of the proposition involved. We are of opinion that the lower court properly overruled Mrs. Nowicki's motion to dismiss the suit, and that no error was committed in entering a decree in favor of plaintiffs, upon defendants refusal to answer the complaint. The decree of the Circuit court is affirmed.

DECREE AFFIRMED.

Scanlan and Sullivan, JJ., concur.

showing what the proceedings and issues were in the original court.

It is clearly established that a party producing a record in this court is required to present to the court a full transcript of the proceedings, showing the proceedings and issues involved, the findings of the court, the facts, and the findings and judgment entered thereon. It is only upon the face of a complete record that a court can determine whether the contention that the second writ is barred by a prior judgment can be effectively determined. In the case at bar, Mrs. Gordon failed to make such a showing, and the affidavit of the said judge cannot be held to supply matters shown of record and which are contained in the files and transcript of proceedings of the court. As to the court properly disregarded the affidavit of the Municipal Court judge, and without it the record presented on the motion to dismiss is

completely inadequate.

It is earnestly urged by plaintiff that the Municipal Court judgment is not conclusive because the court had no jurisdiction to hear and determine an independent case involving the parties of the parties, and that the second writ involves a different question on claim which the Municipal Court did not and could not adjudicate, and a considerable portion of the rights of both parties is devoted to this question. However, in the view we take, it is unnecessary to enter into a discussion of the proposition involved. It is our opinion that the first writ properly covered the same, and that no error was committed in entering a decree in favor of plaintiff, upon defendant's refusal to answer the complaint. The decree of the Circuit Court is affirmed.

WILLIAM W. BROWN.

Attorney for Plaintiff.

41351

FRANK DUSEK and BARBORA DUSEK,
Appellants,

v.

WILLIAM H. BRITIGAN, doing
business as WILLIAM H. BRITIGAN
REALTY ASSOCIATION,
Appellee.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

309 I.A. 130²

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit to recover from defendant payments made under a contract for the purchase of real estate in Chicago, on the ground that the execution of the contract was induced by alleged fraudulent representations. After plaintiffs had filed their third amended complaint the court sustained defendant's motion to strike the same, and dismissed the suit. Plaintiffs appeal from the order thus entered.

As appears from the pleadings, plaintiffs had entered into a contract with defendant to purchase subdivided property in Chicago, early in March, 1927, and made substantial payments under the contract until May, 1932. Because of the prevailing economic conditions, it became difficult for them to maintain the payments stipulated in the contract, and Britigan's representatives thereupon suggested a new contract reducing the amount of the payments to be made. Such contract was prepared and executed by the parties November 19, 1932. Defendants failed to make any payments under the second agreement. They allege that early in 1933 they became aware that Britigan, through his agents, had fraudulently misrepresented certain material facts which induced them to enter into the agreement, and consequently refused to make any payments under the second agreement, and demanded a refund of all sums that had theretofore been paid by them under the first contract. October 12, 1936, Britigan served a notice of intention to determine and cancel the agreement, assigning as a reason therefor the failure of

WILLIAM E. BRITIGAN, JR.
Attorney at Law
Chicago, Illinois

ATTEST
JOHN J. CONNELLEY
Notary Public
Chicago, Illinois

300-1-A-130

MR. PRESIDING JUSTICE THOMAS DELIVERED THE OPINION OF THE COURT.
Plaintiffs brought suit to recover from defendant payments made under a contract for the purchase of real estate in Chicago, on the ground that the execution of the contract was induced by alleged fraudulent representations. After plaintiffs had filed their bill, defendant moved to dismiss the same, and plaintiffs moved to strike the same, and dismissed the suit. Plaintiffs appeal from the order thus entered.
As appears from the findings, plaintiffs had entered into a contract with defendant to purchase subdivided property in Chicago, early in 1927, and made substantial payments under the contract until May, 1932. Because of the prevailing economic conditions, it became difficult for them to maintain the payments stipulated in the contract, and Britigan's representative contacted a law firm which suggested the amount of the payments to be made. This contract was prepared and executed by the parties November 19, 1932. Defendants failed to make any payments under the second agreement. They allege that early in 1933 they became aware that Britigan was a law firm, and consequently discontinued payments. Material facts which induced them to enter into the agreement, and consequently refused to make any payments under the second agreement, and demanded a return of all sums that had theretofore been paid by them under the first contract, October 12, 1930. Britigan served a notice of intention to discontinue and cancel the agreement, assuming as a reason therefor the failure of

plaintiffs to pay further installments, and claiming as liquidated damages all the money that had already been paid by plaintiffs.

The original complaint was filed January 30, 1937. The second agreement for reduction of installment payments was made November 19, 1932. The third amended complaint alleges that early in 1933 plaintiffs first became aware of the falsity of the alleged representations made by Britigan's agents, but they waited almost five years before suit was instituted.

The fraudulent representations alleged to have induced them to enter into the agreement are briefly: (1) that the First National Bank of Chicago had purchased the Northwest corner of Lincoln and Foster avenues and had plans for building a large bank building there; (2) that the southwest corner of Lincoln and Rascher avenues was the only corner of the subdivision not yet sold by the defendant; (3) that all the frontage on Lincoln avenue in this subdivision between Rascher avenue and Catalpa avenue was sold to a theatre syndicate for a big show house; (4) that the elevated railway had plans already made locating an elevated railroad station on the subdivision within four years; (5) that the city had plans already drawn to open up Rascher avenue all the way to the lake. It is alleged that all these representations were false, that they were known to be false to defendant and his agents, that plaintiffs reasonably believed all these statements to be true, relied upon them, and by reason of the misrepresentations were induced to purchase the property in question.

Since the case was disposed of on pleadings, a brief statement of the status of these pleadings will afford a better understanding of the issues involved. The complaint referred solely to the original contract of purchase executed by the parties March 15, 1927. Defendant's motion to strike this complaint was sustained. The first amended complaint referred solely to the second contract executed by the parties November 19, 1932, by which installment

plaintiffs to pay further installments, and claiming as liquidated damages all the money that had already been paid by plaintiffs.

The original complaint was filed January 30, 1937. The second agreement for redemption of installment payments was made November 19, 1937. The third amended complaint alleges that early in 1937

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to enter into the agreement are briefly: (1) That the first

national bank of Chicago had purchased the Northwest corner of Lincoln and Boston avenues and had plans for building a large bank building there; (2) That the southwest corner of Lincoln and Ketcher avenues was the only corner of the subdivision not yet sold by the defendant; (3) That all the frontage on Lincoln avenue in this

subdivision between Ketcher avenue and Caligan avenue was sold to a theatre syndicate for a big show house; (4) That the elevated railway had plans already made for building an elevated railroad station on the subdivision within four years; (5) That the city had plans already made to open up Ketcher avenue all the way to the lake. It is alleged that all these representations were false, that they were known to be false by defendant and his agents, that plaintiffs reasonably believed all these statements to be true, relied upon them, and by reason of the misrepresentations were induced to

execute the contract in question.

Since the case was disposed of on pleadings, a brief statement of the status of these pleadings will afford a better understanding of the issues involved. The complaint referred solely to the original contract of purchase executed by the parties March 19, 1937. Defendant's motion to strike this complaint was sustained. The first amended complaint referred solely to the second contract executed by the parties November 19, 1937, by which installment

payments required of plaintiffs were reduced in amount. This amended complaint was likewise stricken by the court on defendant's motion. The second amended complaint again referred solely to the second contract, executed by the parties November 19, 1932. After count 2 of this second amended complaint had been stricken by the court defendant answered denying the fraud alleged and pleading in substance that on and prior to November 19, 1932, plaintiffs were in default under their original agreement; that the balance of the purchase price had become due and payable; that plaintiffs had requested an extension of the time of payment of the moneys due under the earlier contract and that they be permitted to pay in installments the balance of the moneys due; and it is averred that negotiations resulted in the execution of the second agreement of November 19, 1932, permitting payment of the balance of the purchase price in reduced installments.

Plaintiffs argue that there was no necessity for them to file the third amended complaint after defendant had answered the second amended complaint, but that they did so of their own volition, with the sanction of opposing counsel and the court in an attempt to clarify all the issues and make clear and unequivocal the facts upon which they expected to introduce evidence. The facts remains, however, that in none of the former pleadings had both contracts and the circumstances which induced the execution of the second agreement been fully set forth, and it was not until the third amended complaint was filed that the entire transaction between the parties was fully set forth in any one pleading. Thus, for the first time, the court had before it the controversy in its entirety, as alleged by plaintiffs, and when the court ruled upon defendant's motion to strike the third amended complaint the sole question involved was whether this pleading was obnoxious to the specific ground specified in the motion to dismiss.

One of the reasons urged for reversal is that "a motion to

payments remained of plaintiff's were reduced in amount. This amended complaint was likewise amended by the court on January 1, 1933. The second amended complaint again stated that plaintiff to the second contract, executed by the parties November 12, 1932, after court 2 of this second amended complaint had been decided by the court defendant answered denying the third alleged and plaintiff in substance that on and prior to November 12, 1932, plaintiff's were in default under their original agreement; that the balance of the purchase price had become due and payable; that plaintiff had requested an extension of the time of payment of the money due under the earlier contract and that they had permitted to pay in installments the balance of the money due; and it is averred that negotiations resulted in the execution of the second agreement of November 12, 1932, providing payment of the balance of the purchase price in reduced installments.

Plaintiff's argue that there was no necessity for them to file the third amended complaint after defendant had answered the second amended complaint, but that they did so of their own volition, with the sanction of opposing counsel and the court in an attempt to clarify all the issues and make clear and unambiguous the facts upon which they expected to introduce evidence. The facts remain, however, that in none of the former pleadings had both contracts and the circumstances which induced the execution of the second agreement been fully set forth, and it was not until the third amended complaint was filed that the entire transaction between the parties was fully set forth in any one pleading. Thus, for the first time, the court had before it the controversy in its entirety, as alleged by plaintiff, and when the court ruled upon defendant's motion to strike the third amended complaint the sole question involved was whether this pleading was objectionable to the specific grounds specified in the motion to dismiss.

One of the reasons urged for reversal is that "a motion to

strike, in the nature of a demurrer, cannot properly be filed to an amended complaint as to any matter contained in a previous complaint to which an answer had been previously interposed," and it is argued that a survey of the former pleadings will serve to show that every fact set forth in the third amended complaint had been inserted in the record by prior pleadings, and that no new facts were presented in the third amended complaint. Evidently defendant was willing to stand upon his answer to the second amended complaint which showed how the contract of November 19, 1932, came into being, and neither the court nor defendant requested plaintiffs to file the third amended complaint, and it is perfectly clear that this last complaint correlated for the first time the contract of November 19, 1932, with the original agreement of March 15, 1927. When plaintiffs filed their third amended complaint they did so by leave of court and at their request, and defendant was ordered "to answer, move to strike or otherwise plead in answer to the same, within twenty days." Under these circumstances, it seems to us that the contention made is untenable. The important consideration is that not until this third amended complaint was filed did plaintiffs incorporate facts in a single pleading to which a motion to strike might properly be directed, and that left only the question whether the complaint was sufficient, whether it entitled plaintiffs to proceed to a hearing, and whether plaintiffs' cause of action had been barred by the five year statute of limitations.

Defendant's motion to strike the third amended complaint and to dismiss the suit was predicated upon the following ground: (1) that the third amended complaint is insufficient in law; (2) that it affirmatively appears therefrom that plaintiffs were not damaged by the purported representations alleged to have been made in November, 1932; (3) that it affirmatively appears therefrom that the supposed cause or causes of action did not accrue to plaintiffs at any time within five years next before the commencement of the suit. A full argument was had before the court on defendant's motion to strike, and no objection was interposed by plaintiffs' attorney either

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an amended complaint as to any matter contained in a previous
complaint to which an answer had been previously interposed,"
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into being, and neither the court nor defendant requested plain-
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of November 19, 1932, with the original agreement of March 11, 1932.
When plaintiffs filed their third amended complaint they did so by
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whether the complaint was sufficient, whether it entitled plaintiffs
to proceed to a hearing, and whether plaintiffs' cause of action had
been barred by the five year statute of limitations.
Defendant's motion to strike the third amended complaint and to
dismiss the suit was predicated upon the following grounds: (1) that
the third amended complaint is insufficient in law; (2) that it
affirmatively appears therefrom that plaintiffs were not damaged by
the purported representations and as to have been made in November,
1932; (3) that it affirmatively appears therefrom that the supposed
cause or cause of action did not accrue to plaintiffs at any time
within five years next before the commencement of the suit. A bill
of particulars was filed before the court on defendant's motion to strike,

prior to or during the argument as to the propriety of the motion on the ground that an answer had been filed to a prior pleading. After the argument had been completed the court announced its decision and entered the order striking the last complaint and dismissing the suit.

An examination of the third amended complaint discloses that it does not set forth a good cause of action against defendant. The purported reiteration of representations made over five years after plaintiffs purchased the property, notwithstanding the fact that they had ample opportunity to determine the true facts, does not give rise to actionable fraud. Plaintiffs alleged that they became aware of the alleged fraudulent representations in 1933. It is apparent, however, that a period of more than five years elapsed between the time that they purchased the property and the time when they became aware that the representations were untrue. There is nothing to show why they could not have ascertained the facts at a much earlier date. Furthermore, they awaited from 1933, when the facts are alleged to have come to their attention, until January, 1937, before instituting suit. Parties seeking to rescind a contract on ground of fraud are required to act diligently, and our courts have consistently held that after a long and unexplained delay, when the sources of information which would have led to the disclosure of the true facts were readily available, a plaintiff will not be heard to complain. In the recent case of Jackson v. Anderson, 355 Ill. 550, the bill was not filed until seven years after the transaction there in question, and the court held that the cause of action was barred by the statute of limitations, citing Knight v. St. Louis, Iron Mountain & Southern Ry. Co., 141 Ill. 110; Mowatt v. City of Chicago, 292 Ill. 578; Parmalee v. Price, 208 Ill. 544. In commenting upon the claim of defendants in error [plaintiffs] in the Jackson case, that they had not been apprised of the true facts until about a year before they filed their bill, the court said: "Defendants in error say that they did not learn of the

prior to or during the argument as to the propriety of the motion on the ground that an answer had been filed to a prior pleading. After the argument had been completed the court announced its decision and entered the order sustaining the last complaint and dismissing the suit.

An examination of the third amended complaint discloses that it does not set forth a good cause of action against defendant. The purported narration of representations made over five years after Plaintiff purchased the property, notwithstanding the fact that they had ample opportunity to determine the true facts, does not give rise to actionable fraud. Plaintiff alleged that they became aware of the alleged fraudulent representations in 1937. It is apparent, however, that a period of more than five years elapsed between the time that they purchased the property and the time when they became aware that the representations were untrue. There is nothing to show why they could not have ascertained the facts at a

much earlier date. Furthermore, they waited from 1937, when the facts are alleged to have come to their attention, until January, 1937, before instituting suit. Parties seeking to rescind a contract on ground of fraud are required to act diligently, and any contacts have consistently held that after a long and unexplained delay, when the sources of information which would have led to the disclosure of the true facts were readily available, a plaintiff will not be heard to complain. In the recent case of Jackson v. Anderson, 357 Ill. 590, the bill was not filed until seven years after the transaction there in question, and the court held that the cause of action was barred by the statute of limitations, citing Smith v. St. Louis, Iron Mountain & Southern Ry. Co., 141 Ill. 110; Boyd v. City of Chicago, 352 Ill. 578; Farmer v. Price, 303 Ill. 544.

In commenting upon the claim of defendants in error (plaintiffs) in the Jackson case, that they had not been apprised of the true facts until about a year before they filed their bill, the court said: "Defendants in error say that they did not learn of the

existence of the alleged cause of action until about a year prior to filing the bill. This does not prevent the running of the statute, however, as there is neither allegation nor proof of any fraudulent concealment. (Citing cases.) Mere silence of the defendant and mere failure on the part of the complainant to learn of a cause of action do not amount to such fraudulent concealment. (Citing cases.) Furthermore, we have held that good faith and reasonable diligence are essential elements in asking for relief from a court of equity. (LeGout v. LeVieux, 338 Ill. 46.) There is no showing of any reason why the complainants could not have learned in 1926 of the facts which they claimed to have learned in 1931. There is no showing of any diligence to learn such facts, and it is hardly consistent with good faith to hold a valuable piece of property through the economically fat years, and then, during times that are economically lean, seek to repudiate the deal whereby it was acquired." We think the foregoing quotation from the opinion is precisely applicable to the circumstances of the case at bar and for similar reasons.

Plaintiffs contend that the discovery of fraud is the starting time for the running of the statute of limitations. If this were true, it would place within the plaintiffs' control the right to determine the beginning of the period. Our limitations statutes are predicated upon the principle that unless there has been affirmative fraudulent concealment, the date on which the statute commences to run should be definitely fixed and should not be placed within the control, discretion or determination of one of the parties. Parsons on Contracts (8th ed., edited by Williston), vol. III, p. 92, states that "the statute begins to run whenever the creditor or plaintiff could bring his action and not when he knew he could." The fraud charged in this proceeding occurred in March, 1927. There was ample opportunity to ascertain the facts before the expiration of the five year limitation period. Never-

existence of the alleged cause of action until about a year prior to filing the bill. This issue was presented the remainder of the statute, however, as there is neither allegation nor proof of any fraudulent concealment. (Citing cases.) The silence of the defendant and mere failure on the part of the complainant to learn of a cause of action do not amount to such fraudulent concealment. (Citing cases.) Furthermore, we have held that good faith and reasonable diligence are essential elements in seeking recovery from a party of equity. (Citing cases.) It is no showing of any reason why the complainant could not have learned in 1936 of the facts which they claimed to have learned in 1931. There is no showing of any diligence to learn what facts, and it is hardly consistent with good faith to hold a valuable piece of property through the economically lean years, and then, during times that are economically lean, seek to repudiate the debt whereby it was acquired." We think the foregoing proposition from the opinion is precisely applicable to the circumstances of the case at bar and for similar reasons.

Plaintiff contends that the discovery of fraud is the starting time for the running of the statute of limitations. If this were true, it would place within the plaintiff's control the right to determine the beginning of the period. Our limitations statutes are predicated upon the principle that unless there has been affirmative fraudulent concealment, the date on which the statute commences to run should be definitely fixed and should not be placed within the control, discretion or determination of one of the parties. Parsons on Contracts (19th ed., edited by Williston), vol. III, p. 92, states that "the statute begins to run from the creditor or plaintiff could bring his action and not when he knew he could." The trend changed in this proceeding occurred in March, 1937. There was ample opportunity to ascertain the facts before the expiration of the five year limitation period. Never-

theless, plaintiffs waited almost ten years after their purchase before instituting suit. Under the case cited, and the authorities therein relied upon, we think plaintiffs must be charged with lack of diligence, and they are necessarily barred by the statute from maintaining this suit.

Other points are raised by the parties in their respective briefs, but we think the foregoing points are sufficient to dispose of the matter. The court properly sustained defendant's motion to strike plaintiffs' third amended complaint and was not in error in ordering the dismissal of the suit. The orders of the Circuit court are affirmed.

ORDERS AFFIRMED.

Scanlan and Sullivan, JJ., concur.

41457

WILLIAM H. TERRELL,
Appellee.

v.

GEORGE H. WILSON,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

3091.A. 131

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In December, 1935, plaintiff brought suit against defendant for commissions amounting to \$374.63, alleged to be due under an oral agreement. A writ of attachment in aid was issued, and upon its return showing that defendant was not found, the writ of attachment was served, together with interrogatories, upon certain garnishees who answered that they had in their possession, respectively, \$59.30 and \$17.76, belonging to defendant. Thereafter defendant filed his special appearance, together with his motion to quash the attachment, which was denied by the court, after which he interposed an answer by way of defense. Both the issues as to the attachment and those raised upon the merits of plaintiff's claim were tried by the court without a jury, resulting in findings for plaintiff and assessing his damages at \$162.30, and entering judgment against the garnishees upon their answer for the amounts respectively held by them. On appeal to this court we held that defendant had not had a full, fair and complete hearing upon the issues as to the attachment, and reversed and remanded the cause for another trial. (Terrell v. Wilson, No. 39701, opinion filed May 3, 1938.) Pursuant to this decision defendant demanded a trial by jury both as to the merits of plaintiff's claim and on the issues raised as to the attachment. On the second trial the jury returned a verdict in favor of plaintiff for \$314 on his claim for commissions, found the issues for plaintiff and against defendant as to the attachment, and also found the issues for plaintiff and against defendant on a counterclaim filed by him. Judgment was entered accordingly, and defendant has prosecuted this second appeal.

UNITED STATES DISTRICT COURT

v.

CHURCH & DWIGHT

MR. FRANKLIN J. MURPHY, JR. and others, Defendants.

In December, 1935, Plaintiff brought suit against defendant and for commissions amounting to \$274.62, alleged to be due under an oral agreement. A writ of attachment in aid was issued, and upon its return showing that defendant was not found, the writ of attachment was served, together with interrogatories, upon certain garnishees who answered that they had in their possession, respectively, \$22.30 and \$17.75, belonging to defendant. Whereafter defendant filed his special appearance, together with his motion to quash the attachment, which was denied by the court, after which he interposed an answer by way of defense. Both the issues as to the attachment and those raised upon the writs of plaintiff's claim were tried by the court without a jury, resulting in findings for plaintiff and assessing his damages at \$128.30, and entering judgment against the garnishees upon their answer for the amounts respectively held by them. On appeal to this court we held that defendant had not had a full, fair and complete hearing upon the issues as to the attachment, and reversed and remanded the cause for another trial. (Hearings v. Wilson, No. 39701, opinion filed May 3, 1936.) Pursuant to this decision defendant demanded a trial by jury both as to the writs of plaintiff's claim and on the issues raised as to the attachment. On the second trial the jury returned a verdict in favor of plaintiff for \$214 on his claim for commissions, found the issues for plaintiff and against defendant as to the attachment, and also found the issues for plaintiff and against defendant on a counterclaim filed by him. Judgment was entered accordingly, and defendant has prosecuted this second

The pertinent portions of plaintiff's statement of claim are: "For services rendered by him in 1935, for the sum of \$374.63 due plaintiff as commission for services rendered defendant by plaintiff, a real estate broker licensed by the State and City of Chicago, upon agreement of defendant to pay plaintiff commission of ten per cent of the amount saved the defendant in purchasing and paying off two real estate mortgages of \$1,989.53 and \$1,060 on the property of the defendant known by street number as 3809 South Wabash avenue in said city, which mortgages were paid off and released for \$150 and \$100 respectively, and for reduction of first mortgage on said property which was reduced in the sum of \$846.80, making a total reduction of \$3,746.33 and total commission of \$374.63, upon which defendant paid the sum of \$50 leaving a balance of \$324.63, no part of which has been paid plaintiff, though many times demanded.

"There is due the plaintiff from defendant after allowing the defendant all just credits, deductions, and set-offs, \$324.63.

"The defendant within two years last past fraudulently conveyed or assigned part of his effects so as to hinder and delay his creditors and is about fraudulently to convey, conceal, assign or otherwise dispose of his property or effects so as to hinder and delay his creditors."

The attachment in aid issued upon the allegation that defendant was the owner of real estate at 3809 South Wabash avenue, Chicago, and had either fraudulently conveyed or assigned part of his effects or was about to do so and to dispose of his property so as to hinder and delay his creditors.

Defendant in his counterclaim alleged that he had delivered to plaintiff a check made payable to one William Perry for the purpose of reduction and payment of certain taxes upon the property at 3809 Wabash avenue; that the check was indorsed and cashed by plaintiff; that defendant demanded a receipt showing the payment of taxes, which plaintiff refused to deliver; and that upon checking the tax record

The pertinent portions of Plaintiff's statement of claim are: "For services rendered by him in 1935, for the sum of \$344.83 the Plaintiff is entitled to a commission for services rendered defendant by Plaintiff, a real estate broker licensed by the State and City of Chicago, upon agreement of defendant to pay Plaintiff commission of ten per cent of the amount saved the defendant in purchasing and paying off two real estate mortgages of \$1,000.00 and \$1,000.00 on the property of the defendant known by street number as 3809 North Western Avenue in said city, which mortgages were paid off and noted for \$100 and \$100 respectively, and for reduction of first mortgage on said property which was reduced in the sum of \$344.83, making a total reduction of \$744.83 and total commission of \$74.48, upon which defendant paid the sum of \$50 leaving a balance of \$394.83, no part of which has been paid Plaintiff, though many times demanded. "There is due the Plaintiff from defendant after allowing the defendant all just credits, deductions, and set-offs, \$344.83. "The defendant within two years last past fraudulently conveyed or assigned part of his effects so as to hinder and delay his creditors and is about fraudulently to convey, conceal, assign or otherwise dispose of his property or effects so as to hinder and delay his creditors." The attachment in aid issued upon the allegations that defendant was the owner of real estate at 3809 North Western Avenue, Chicago, and had either fraudulently conveyed or assigned part of his effects or was about to do so and to dispose of his property so as to hinder and delay his creditors. Defendant in his counterclaim alleged that he had delivered to Plaintiff a check made payable to one William Perry for the purpose of reduction and payment of certain taxes upon the property at 3809 Western Avenue; that the check was endorsed and cashed by Plaintiff; that defendant demanded a receipt showing the payment of taxes, which Plaintiff refused to deliver; and that upon checking the tax record

it was found that no part of the \$87.76, which was the face value of the check, was paid for taxes upon the premises; wherefore, defendant sought to recover by counterclaim the amount of said \$87.76.

The issues upon the merits of plaintiff's claim, the attachment and the counterclaim, were fully tried before the court and jury, and determined adversely to defendant's claim. With reference to the attachment, there was evidence, which was denied by defendant, that the latter had told plaintiff he expected to dispose of his property to his brother and proceed to France to marry his fiancée and take with him whatever proceeds he derived from the sale or transfer of the property.

With respect to the merits of plaintiff's claim there is abundant evidence to show that defendant had orally agreed to pay him 10% of any reduction of several past due mortgages on defendant's property, and that as a result of this agreement plaintiff, who was a licensed real estate broker, had effected a saving of \$3,746.33, for which he claimed to be entitled to \$374.63 as commission. On account of this claim defendant had paid him \$50, leaving a balance on which the verdict and judgment is predicated.

As to the counterclaim, plaintiff denied that the check for \$87.76 was delivered to him at his request, or that it was to be used for the payment of certain taxes upon defendant's property, and plaintiff claimed that he was merely an accommodation indorser, and therefore not liable.

Defendant raises some 11 separate points in his brief in support of his contention that judgment should be reversed. However, we have examined the abstract of record carefully and are convinced that the issues were fairly tried. While it is true that the evidence was conflicting in many respects, all the issues were fairly presented to the jury, who determined the facts adversely to defendant. The court on the first trial resolved the issues in favor of plaintiff, and the jury and court in the second trial did likewise. We find no convincing reason for reversing the judgment and it is affirmed.

Scanlan and Sullivan, JJ., concur. AFFIRMED.

it was found that on part of the \$17,750, which was the total amount of the check, was paid for taxes upon the property mentioned, and the balance to be paid by defendant. The amount of said \$17,750. The taxes upon the basis of plaintiff's check, the balance sent and the commission, some \$11,111.11, which the court has found, and defendant's liability to defendant's estate, in connection with the attachment, there was evidence, which was given by defendant, that the latter had sold plaintiff's property to the latter and that to his brother and proceed to finance to carry the taxes and also the other matters proceeds to be given from the sale of the latter of the property.

With respect to the matter of plaintiff's claim that as defendant's evidence to show that defendant had orally agreed to pay him 10% of any reduction of several past and present on defendant's property, and that as a result of this agreement plaintiff, who was a licensed real estate broker, had effected a saving of \$17,750.00 for which he claimed to be entitled to \$17,750.00 as commission. On account of this claim defendant had paid him \$200, leaving a balance on which the verdict and judgment is granted.

As to the commission, plaintiff denied that the check for \$17,750 was delivered to him as his request, or that it was to be used for the payment of certain taxes upon defendant's property, and plaintiff claimed that he was merely an accommodation investor, and therefore not liable.

Defendant raises some 11 issues and points in his brief in support of his contention that judgment should be reversed. However, we have examined the abstract of record and find that the evidence that the taxes were timely paid, while it is true that the evidence was conflicting in many respects, all the taxes were timely paid to the jury, who determined the facts adversely to defendant. The court on the first trial resolved the issues in favor of plaintiff, and the jury was found in the second trial all issues, so that on reversal the court for whatever reason can be found.

41555

3920 LAKE SHORE DRIVE BUILDING
CORPORATION,

Appellee,

v.

WILLIAM F. POTTS,

Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

309 I.A. 181²

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment by confession against defendant in the sum of \$660 and attorney's fees, for rent alleged due under a written indenture of lease entered into between the parties. On petition of defendant this judgment was vacated and defendant had leave to appear and make his defense. When the cause was reached for trial, plaintiff filed an amended statement of claim, claiming rents for several additional months. The cause proceeded to trial, with leave given defendant to file his defense later. At the conclusion of the hearing the court, sitting without a jury, entered judgment in favor of plaintiff and against defendant for \$1,554, and this appeal by defendant followed.

The written lease upon which the suit is predicated was entered into on July 15, 1937, and stipulated for a monthly rental of \$222. The provision of the lease under which the controversy arises is: "TO HAVE AND TO HOLD THE SAME for and during the term commencing on the First day of October A. D. 1937 and expiring on the Thirtieth (30) day of September A. D. 1939, inclusive, and from year to year thereafter, unless and until this lease shall be terminated at the date last above mentioned, or at a like date in any subsequent year thereafter, by the giving by either party to the other of not less than sixty (60) days' notice in writing of such termination, which said notice shall be delivered in person or sent by registered mail, when to Lessor, at the place stipulated herein for the payment of rent, and, when to Lessee, at the address of the demised premises."

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

1908

Plaintiff

vs.

Defendant

in the sum of \$100 and attorney's fees, for and alleged that under a written instrument of lease entered into between the parties. On petition of defendant this judgment was vacated and defendant had leave to appear and make his defense. When the cause was reached for trial, plaintiff filed an amended statement of claim, wherein were set forth several additional claims. The cause proceeded to trial, with leave given defendant to file his defense later. At the conclusion of the hearing the court, sitting without a jury, entered judgment in favor of plaintiff and against defendant for \$1,524, and this appeal by defendant follows.

The written lease upon which the suit is predicated was entered into on July 15, 1907, and stipulated for a monthly rental of \$222. The provision of the lease under which the controversy arises is: "TO HAVE AND TO HOLD THE SAME for and during the term commencing on the first day of October A. D. 1907 and ending on the thirtieth (30) day of September A. D. 1909, inclusive, and from year to year thereafter, unless and until this lease shall be terminated at the date last above mentioned, or at a like date in any subsequent year thereafter, by the giving by either party to the other of not less than sixty (60) days' notice in writing of such termination, which said notice shall be delivered in person or sent by registered mail, when so necessary, at the place designated herein for the service of such notice, and be returnable to the sender at the address designated."

Leander J. Ibold was president of plaintiff corporation. He managed the property and had signed the lease in question on behalf of plaintiff. Defendant testified that he had suffered a decrease in his income after the first year which made it impossible for him to continue the occupancy of the premises, and that in the fall of 1938 and the spring of 1939 he had numerous conversations with Ibold, advising him that he would have to give up the premises and would, if possible, like to sublet the apartment for the balance of the term, which expired on September 30, 1939. He says that he asked Ibold to co-operate with him in finding a subtenant, that upon Ibold's suggestion he advertised the apartment, and sent prospective tenants to Ibold, who had promised to co-operate with him in procuring a subtenant. The effort was fruitless, however, and June 27, 1939, which was more than sixty days prior to the expiration of the lease by its terms, defendant prepared a notice, addressed to plaintiff, as follows: "You are hereby advised that my lease for apartment 13 South, in your building, expires on September 30, 1939, and that I do not wish to renew the lease upon its expiration." According to the undisputed testimony, defendant delivered this notice to R. E. Hanley, who was a director of plaintiff corporation, and Hanley testified that he delivered "it to Ibold directly." Although Ibold did not specifically deny having received this notice from Hanley, he did say that "I did not at any time more than sixty days prior to the expiration of this lease, receive notice in writing that this tenant was thereby terminating this lease."

Plaintiff takes the position that since no written notice was served on it sixty days prior to September 30, 1939, and "delivered in person or sent by registered mail *** at the place stipulated herein for the payment of rent," the lease was automatically renewed for another year; that the provision for notice was neither waived by plaintiff nor complied with by defendant, and

December 3, 1939, Ibold was president of Plaintiff corporation. He managed the property and had signed the lease in question on behalf of Plaintiff. Defendant testified that he had suffered a decrease in his income after the first year which made it impossible for him to continue the occupancy of the premises, and that in the fall of 1938 and the spring of 1939 he had numerous conversations with Ibold, advising him that he would have to give up the premises and would, if possible, like to sublet the apartment for the balance of the term, which expired on September 30, 1939. He says that he asked Ibold to co-operate with him in finding a subtenant, that upon Ibold's suggestion he advertised the apartment, and upon prospective tenants to Ibold, who had promised to co-operate with him in procuring a subtenant. The effort was fruitless, however, and during 1939, which was more than sixty days prior to the expiration of the lease by its terms, defendant prepared a notice, addressed to Plaintiff, as follows: "You are hereby advised that my lease for apartment 13 north, in your building, expires on September 30, 1939, and that I do not wish to renew the lease upon its expiration." According to the undisputed testimony, defendant delivered this notice to E. M. Manley, who was a director of Plaintiff corporation, and Manley testified that he delivered "it to Ibold directly." Although Ibold did not specifically deny having received this notice from Manley, he did say that "I did not at any time receive more than sixty days prior to the expiration of this lease, receive notice in writing that this tenant was thereby terminating this lease."

Plaintiff takes the position that since no written notice was served on it sixty days prior to September 30, 1939, and "delivered in person or sent by registered mail *** at the place stipulated herein for the payment of rent," the lease was automatically renewed for another year; that the provision for notice was neither waived by Plaintiff nor complied with by defendant, and

that the latter became liable for rent for the months subsequent to September, 1939, and prior to the renting of the property to a new tenant by plaintiff May 1, 1940.

The law is well established, however, that provisions of this kind in a lease calling for notice are made for the benefit of the parties, and may be waived by conduct which thereafter constitutes an estoppel from insisting upon strict compliance with the terms of the condition. (Fuchs v. Peterson, 232 Ill. App. 287; Citizen's Bank Bldg. v. L. & E. Wertheimer, 126 Ark. 38, 189 S. W. 361; Traubman v. Sevestre (W. J. 1926) 133 Atl. 292; Simon Ginsberg Realty Co. v. Grunstein (N.Y. 1936) 286 N. Y.S. 33.)

It is clear from the record that on or about June 27, 1939, defendant sent the notice, heretofore set forth, to Ibold through Hanley, a director of the corporation. Ibold does not deny that Hanley delivered this notice to him, but merely says that within the provisions of the lease he did not receive notice in writing that defendant was "thereby terminating this lease," and the fair inference, in the absence of such a denial, is that defendant prepared and delivered the notice to Hanley and that Hanley delivered it to Ibold.

Aside from this consideration, however, it is also clear from the evidence that Ibold knew as early as the fall of 1938, or in the spring of 1939, that defendant had no intention of renewing the tenancy. Defendant's evidence relating to his conversations with Ibold about subletting the premises, and the efforts made to do so, are undisputed. In fact, Ibold admitted that defendant had told him as early as June, 1939, that he wished to terminate his lease and vacate the property, and that he assisted defendant in attempting to sublet the apartment for the balance of the term. Notwithstanding this conduct on the part of Ibold, defendant addressed the written notice on June 27, 1939, which Ibold presumably received and he must have known for more than sixty days prior to the expiration of the lease by its terms that defendant had no intention whatsoever of remaining in the apart-

ment.

Ibold, Hanley and defendant all held stock in the plaintiff corporation, and Hanley was a director thereof. Defendant testifies that late in March or April, 1939, Ibold had asked him to attend a stockholders' meeting and assist in the election of certain directors, including Ibold, and he said that Ibold had suggested that if defendant would render this assistance he (Ibold) would extend every effort on his part to release defendant from his lease. Defendant attended the meeting and Ibold was elected a director. There is also evidence to the effect that in June, 1939, Ibold called defendant on the telephone and personally offered to buy his stock for \$400, and that on June 27, 1939, he sold his stock to Hanley. According to the evidence there was a contest on for control of the corporation at that time, and defendant's counsel argue that defendant's refusal to sell his stock to Ibold constituted the motive for this proceeding.

Counsel for the respective parties argue pro and con that no notice was necessary to terminate the lease; that a tenancy from year to year is not created by contract, but rather under a rule of law based upon the tenant's holding over after a lease for a definite term; and that since there was no holdover, defendant is not obligated to plaintiff, since according to his own testimony he never occupied the premises after August, 1939. In the view that we take, however, it is unnecessary to enter into a discussion of these questions. We are satisfied that the notice given by defendant was sufficient to comply with the provisions of the lease, and that Ibold's knowledge and conduct constituted a waiver of the strict terms of the lease with respect to notice and amounts to an estoppel against plaintiff from contending that the provisions of the lease with reference to notice were not fully complied with.

We think the conclusions of the trial court and the judgment were contrary to the manifest weight of the evidence, and since the cause was tried without a jury it would serve no useful purpose to

remand the cause for retrial. Therefore, the judgment of the Municipal court is reversed and judgment is entered here for defendant for costs.

During the pendency of this cause, appellee moved to amend its statement of claim so as to include another month's rental. This motion was reserved for hearing and is now denied.

JUDGMENT REVERSED AND JUDGMENT HERE
FOR DEFENDANT AND AGAINST PLAINTIFF
FOR COSTS.

Scanlan and Sullivan, JJ., concur.

remains the same for rental. Therefore, the payment of the
Municipal court is reversed and judgment is entered there for
defendant for costs.

During the pendency of this cause, appellee never to
show its statement of claim so as to include another month's
rental. This motion was reversed for hearing and is now denied.

WILLIAM H. HARRIS AND W. G. HARRIS
FOR PLAINTIFF AND DEFENDANT
THE COURT.

WILLIAM H. HARRIS AND W. G. HARRIS, 32, corner.

41025

CARROLL GRAHAM GLASS CO.,
Appellee,

v.

WALTER A. STATTMAN and
MARY A. STATTMAN,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

309 I.A. 132

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A judgment by confession for \$5,127.75 was entered against Walter A. Statzman and Mary A. Statzman, defendants, on a promissory note for \$4,805. The amount of the judgment included \$322.75 for attorney's fees. Defendants filed a motion to vacate the judgment, in which they alleged that there was no such corporation as Carroll Graham Glass Company authorized to do business in Illinois, and that there was no consideration for the note. An order was entered opening the judgment and granting defendants leave to appear and make defense, the judgment to stand as security. The cause was tried by the court without a jury and a judgment was entered confirming the judgment by confession. Defendants appeal from that judgment. Although plaintiff, by its counsel, filed an appearance in this court and made objections to certain motions made by defendants, it has failed to file a brief in defense of the judgment entered by the Municipal court.

Defendants contend, inter alia, that "the trial court erred in not finding that there was a lack of consideration as regards the note upon which the action is predicated." The principal defendant, Walter A. Statzman, was ill at the time of the trial and unable to testify, but after a careful examination of the evidence, including the exhibits in the cause, we are satisfied that the manifest weight of the evidence sustains the contention of defendants that there was no consideration for the note. The evidence shows that Statzman was paid money by Carroll Graham Glass

THE PEOPLE OF THE STATE OF ILLINOIS
 vs.
 [Signature]
 Defendant.
 vs.
 [Signature]
 Appellant.

MR. JUSTICE HOWARD DELIVERED THE OPINION OF THE COURT.

A judgment by confession for \$2,127.75 was entered against Walter A. Statman and Mary A. Statman, defendants, on a promissory note for \$4,000. The amount of the judgment included \$125.75 for attorney's fees. Defendants filed a motion to vacate the judgment, in which they alleged that there was no such corporation as Carroll Graham Glass Company authorized to do business in Illinois, and that there was no consideration for the note. An order was entered opening the judgment and granting defendants leave to appear and make defense. The judgment to stand as security. The cause was tried by the court without a jury and a judgment was entered confirming the judgment by confession. Defendants appeal from that judgment. Although plaintiff, by its counsel, filed an appearance in this court and made objections to certain motions made by defendants, it was failed to file a brief in defense of the judgment entered by the municipal court. Defendants contend, inter alia, that "the trial court erred in not finding that there was a lack of consideration as regards the note upon which this action is predicated." The principal defendant, Walter A. Statman, was ill at the time of the trial and unable to testify, but after a careful examination of the evidence, including the exhibits in the cause, we are satisfied that the meager weight of the evidence sustains the contention of defendants that there was no consideration for the note. The evidence shows that Statman was paid money by Carroll Graham Glass

Company, William F. Carroll and Gerald Graham in connection with the development by Stattman of half a dozen patents that the Glass Company, Carroll and Graham owned, but an examination of certain accounts introduced in evidence shows that any moneys or checks that were given to Stattman were "for traveling expenses and salary for Stattman and salary for mechanics, and raw material, material for development of patents. The salary was for development of patents." The accounts and certain other evidence rebut the theory that Stattman was to be personally liable to plaintiff for the moneys given him by the Glass Company, Carroll and Graham. While Carroll at one time in his testimony stated that the note was given to cover money advanced to Stattman by the Glass Company, Graham and himself, nevertheless, it appears from the testimony of Carroll and Graham that both concede that any moneys "advanced" to Stattman were given him for the purpose of the development of the patents. At one point in his testimony Carroll stated that he had checks that would evidence that he, as an officer of the Carroll Graham Glass Company, "advanced moneys" to Stattman from time to time which Stattman never paid back, and that the note was given to cover these "advancements." But counsel for plaintiff refused to offer the checks in evidence or to show them to counsel for defendants, and the trial court ruled that counsel for defendants was not entitled to look at the checks as plaintiff had not offered them in evidence. Upon cross-examination of Carroll the witness stated, "Money was advanced by us to Stattman for various developments of those enterprises, those caps, and part of it for payment of patents. Q. When you say 'we' advanced money, who do you mean by 'we'; yourself and Mr. Graham? A. Yes."

In view of the entire evidence in the cause, it would be highly inequitable to allow the instant judgment to stand, and we are of the opinion that justice will be best served by a retrial of the cause. Upon a new trial defendant Stattman will have an opportunity to testify.

Company, William J. Carroll and family herein in connection with
the development by statement of said company of the said
Company, Carroll and family owned, but in connection of certain
accounts introduced in evidence above that any money or other
thing were given to Carroll for traveling expenses and salary
for Carroll and family for assistance, and was received, intended
for development of patents. The salary was for development of
patents. The accounts and certain other evidence which the
theory that Carroll was to be financially liable to, intended for
the money given him by the Glass Company, Carroll and family.
While Carroll at one time in his testimony stated that the money
was given to him by money advanced to Carroll by the Glass Company,
Carroll and family, nevertheless, in evidence from the theory
of Carroll and family that the money was given to Carroll
to Carroll were given him for the purpose of the development of
the patents. At one point in his testimony Carroll stated that
he had given that money to Carroll as an officer of the
Carroll and family Glass Company, "advanced money" to Carroll from
time to time which Carroll never paid back, and that the money
was given to cover these "advances". The money for Carroll
was not to cover the money in evidence as to him then to Carroll
for Carroll, and the fact that Carroll never paid back for Carroll
and was not entitled to look at the check as Carroll had not
offered them in evidence. Upon more examination of Carroll the
witness stated, "Money was advanced by me to Carroll for various
development of those patents, those only, and part of it for
money to Carroll, in connection with Carroll and family."
In view of the above evidence in the case, it would be
advisable to allow the witness to testify as above, and to
let it be known that Carroll will be paid by a check at
the close of the trial because Carroll will not be paid.

The judgment of the municipal court of Chicago is reversed, and the cause is remanded for a new trial. This ruling obviates the necessity of our passing upon a motion made by defendants the decision of which was reserved to the final hearing.

JUDGMENT REVERSED, AND CAUSE
REMANDED FOR A NEW TRIAL.

Friend, P. J., and Sullivan, J., concur.

The members of the National Council of Education have
and the same is intended for a new building
the necessity of our building upon a new basis of
decision of which has been referred to the National Council.

THE NATIONAL COUNCIL OF EDUCATION

REPORT OF THE NATIONAL COUNCIL OF EDUCATION

41418

PEOPLE OF THE STATE OF ILLINOIS
ex rel. JOHANNA K. SALOMON, etc.,
et al.,

Appellees,

v.

EDWARD J. KELLY, Mayor of the
City of Chicago, et al.,
Appellants.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

309 I.A. 133¹

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This appeal, together with three other appeals, Gen. Nos. 41419, 41420 and 41480, were consolidated for hearing in this court with the appeal in People ex rel. Estelle Klee, etc., et al. v. Edward J. Kelly, Mayor of the City of Chicago, et al. Gen. No. 41417, in which we have this date filed an opinion. Our decision in that case is controlling as to the questions presented here and for the reasons stated in the opinion in the Klee case the judgment order of the Circuit court of Cook county in the instant case entered on May 10, 1940, is reversed.

JUDGMENT ORDER ENTERED ON
MAY 10, 1940, REVERSED.

Friend, P. J., and Sullivan, J., concur.

REPORT OF THE BOARD
OF THE CITY OF CHICAGO
FOR THE YEAR 1900

REPORT OF THE BOARD
OF THE CITY OF CHICAGO
FOR THE YEAR 1900

REPORT OF THE BOARD
OF THE CITY OF CHICAGO
FOR THE YEAR 1900

REPORT OF THE BOARD
OF THE CITY OF CHICAGO
FOR THE YEAR 1900

REPORT OF THE BOARD OF THE CITY OF CHICAGO FOR THE YEAR 1900

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41419

PEOPLE OF THE STATE OF ILLINOIS)
ex rel. EDNA GLENNON et al.,)
Appellees,)

v.)

EDWARD J. KELLY, Mayor of the)
City of Chicago, et al.,)
Appellants.)

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

309 I.A. 133²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This appeal, together with three other appeals, Gen. Nos. 41418, 41420 and 41480, were consolidated for hearing in this court with the appeal in People ex rel. Estelle Klee, etc., et al. v. Edward J. Kelly, Mayor of the City of Chicago, et al., Gen. No. 41417, in which we have this date filed an opinion. Our decision in that case is controlling as to the questions presented here and for the reasons stated in the opinion in the Klee case the judgment order of the Circuit court of Cook county in the instant case entered on May 10, 1940, is reversed.

JUDGMENT ORDER ENTERED ON
MAY 10, 1940, REVERSED.

Friend, P. J., and Sullivan, J., concur.

41420

PEOPLE OF THE STATE OF ILLINOIS
ex rel. SALVATORE GALLAGHER et al.,
Appellees,

v.

EDWARD J. KELLY, Mayor of the
City of Chicago, et al.,
Appellants.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

309 I.A. 133³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This appeal, together with three other appeals, Gen. Nos. 41418, 41419 and 41420, were consolidated for hearing in this court with the appeal in People ex rel. Estelle Klee, etc., et al. v. Edward J. Kelly, Mayor of the City of Chicago, et al., Gen. No. 41417, in which we have this date filed an opinion. Our decision in that case is controlling as to the questions presented here and for the reasons stated in the opinion in the Klee case the judgment order of the Circuit court of Cook county in the instant case entered on May 10, 1940, is reversed.

JUDGMENT ORDER ENTERED ON
MAY 10, 1940, REVERSED.

Friend, P. J., and Sullivan, J., concur.

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... ..

BE : 1700E

[illegible]

41480

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. CARROLL D. KEHLER et al.,

Appellees,

v.

EDWARD J. KELLY et al.,

Appellants.)

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

309 I.A. 133 4

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This appeal, together with three other appeals, Gen.

Nos. 41418, 41419 and 41420, were consolidated for hearing in
this court with the appeal in People ex rel. Estelle Klee, etc.,
et al. v. Edward J. Kelly, Mayor of the City of Chicago, et al.,

Gen. No. 41417, in which we have this date filed an opinion.

Our decision in that case is controlling as to the questions
presented here and for the reasons stated in the opinion in the
Klee case the judgment order of the Circuit court of Cook county
in the instant case entered June 12, 1940, is reversed.

JUDGMENT ORDER ENTERED ON
JUNE 12, 1940, REVERSED.

Friend, P. J., and Sullivan, J., concur.

Wright, P. B. and Sullivan, J. L. 1990. *Conservation*

41464

JULIA BISSETT,
Appellee,

v.

EARL BISSETT,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

309 I.A. 134

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On May 21, 1940, Julia Bissett, plaintiff, obtained a decree of divorce against Earl Bissett, defendant. The decree ordered defendant to convey to plaintiff his interest in the home in which they lived, the title to which stood of record in the names of plaintiff and defendant as joint tenants, and further ordered defendant to turn over and deliver to plaintiff title to a certain Plymouth coupe automobile. Defendant, on May 28, 1940, filed a notice of appeal to the Supreme court of Illinois from that part of the decree that relates to the real estate and the automobile. On May 29, 1940, defendant's appeal bond, in the sum of \$1,000, was approved and filed, the approval order "directing that the notice of appeal shall operate as a supersedeas." Defendant perfected his appeal to the Supreme court. Upon June 28, 1940, plaintiff filed a petition setting up, inter alia, that defendant, since the entry of the decree of divorce, has occupied the home and has refused to pay her rent for the same; that the approximate rental value of the property is \$65 per month, and the petitioner prayed that an order be entered against defendant to pay her the sum of \$65 each and every month for rent for the premises. Upon July 1, 1940, the trial court entered an order that defendant pay plaintiff "as and for rental for the premises occupied by defendant, the sum of \$65 per month, during the pendency of the appeal of said defendant, beginning May 21, 1940, in order to pay the \$241 semi-annual interest now due on the mortgage covering 2819 North Long Avenue to prevent a foreclosure suit. * * * And it is further

4146

JULIA BISSAC

STATE OF ILLINOIS

OF COOK COUNTY

3081 A. 184

v.

WILL BISSAC

Appellant.

MR. JUSTICE SCHEIDT DELIVERED THE OPINION OF THE COURT.

On May 21, 1940, Julia Bissac, Plaintiff, obtained a

decree of divorce against Will Bissac, Defendant. The decree

ordered defendant to convey to plaintiff his interest in the

home in which they lived, the title to which stood of record in

the names of plaintiff and defendant as joint tenants, and further

ordered defendant to turn over and deliver to plaintiff title to

a certain Plymouth coupe automobile. Defendant, on May 23, 1940,

filed a notice of appeal to the Supreme Court of Illinois from

that part of the decree which ordered him to deliver to plaintiff

automobile. On May 23, 1940, defendant's appeal bond, in the

sum of \$1,000, was approved and filed, the approval order "direct-

ing that the notice of appeal shall operate as a supersedeas."

Defendant perfected his appeal to the Supreme Court. Upon June 23,

1940, plaintiff filed a petition asking an order that, since

defendant, since the entry of the decree of divorce, has occupied

the home and has refused to pay her rent for the same; that the

approximate rental value of the property is \$60 per month; and

the petitioner prayed that an order be entered against defendant

to pay her the sum of \$60 each and every month for rent for the

premises. Upon July 1, 1940, the trial court entered an order that

defendant pay plaintiff ten and ten hundredths for the premises occupied

by defendant, the sum of \$60 per month, during the pendency of the

appeal of said defendant, beginning May 21, 1940, in order to pay the

\$241 semi-annual interest now due on the mortgage covering 3812 North

Long Avenue to prevent a foreclosure suit. * * * and it is further

ordered that said Earl Bissett pay to said Julia Bissett \$250, as and for her expenses during the appeal presented by said Earl Bissett." The instant appeal is from that order. At the time of the entry of the order the appeal to the Supreme court was pending. Defendant contends that "the appeal to the Supreme Court having been perfected, and a supersedeas having been entered therein, the Circuit Court had no jurisdiction or power to enforce the decree by ordering defendant to pay rent for the premises, the title of which is involved in said appeal." There is undoubtedly force in the contention, but in our view of this appeal we need not pass upon this contention. On February 14, 1941, the Supreme court filed an opinion in the case involving the appeal of defendant (Julia Bissett, Appellee, v. Earl Bissett, Appellant, case No. 25883). The opinion is as follows:

"Mr. Chief Justice Gunn delivered the opinion of the Court:

"Appellee, Julia Bissett, obtained a decree of divorce in the circuit court of Cook county against appellant, Earl Bissett, upon the ground of cruelty. At the time the divorce was granted title to the home in which they lived stood of record in the name of both parties as joint tenants. Prior to the granting of the divorce appellant had turned over an automobile to appellee. In lieu of alimony, the court decreed that the interest of appellant in the real estate and the automobile should be conveyed to appellee. Appellant appeals from this portion of the decree, and since this involves a freehold the appeal properly comes directly to this court.

"Appellant claims that, under the facts in this case, appellee had no special equities that entitled her to the conveyance of the husband's interest in the real estate, and claims, also, that the facts disclose he should be reinvested with the portion of the title standing in the name of appellee. While the decree awarding the divorce is not appealed from, the facts shown upon that issue have a bearing upon the equities of the parties to this appeal.

ordered that said Earl Hiss pay to said Julia Hiss \$100,000, as and for her expenses during the appeal presented by said Earl Hiss. The instant appeal is from that order. At the time of the entry of the order the appeal to the Supreme Court was pending. Defendant contends that "the appeal to the Supreme Court having been perfected, and a writ of habeas corpus having been entered thereon, the Circuit Court had no jurisdiction or power to enforce the decree by ordering defendant to pay said sum for the plaintiff, the title of which is involved in said appeal." There is undoubtedly force in the contention, but in our view of said appeal we need not pass upon this contention. On February 14, 1941, the Supreme Court filed an opinion in the case involving the appeal of defendant (Julia Hiss, Appellee, v. Earl Hiss, Appellant, case No. 2983). The opinion is as follows:

"Mr. Chief Justice Stone delivered the opinion of the Court: "Appellee, Julia Hiss, obtained a decree of divorce in the circuit court of Cook County against appellant, Earl Hiss, upon the ground of cruelty. At the time the divorce was granted title to the home in which they lived stood of record in the name of both parties as joint tenants. Prior to the granting of the divorce appellant had turned over an automobile to appellee. In lieu of alimony, the court decreed that the interest of appellant in the real estate and the automobile should be conveyed to appellee. Appellant appeals from this portion of the decree, and since this involves a threshold the appeal properly comes directly to this court. "Appellant claims that, under the facts in this case, appellee had no special equities that entitled her to the conveyance of the husband's interest in the real estate, and claims, also, that the court should be reinstated with the portion of the title standing in the name of appellee. While the decree awarding the divorce is not appealed from, the facts shown upon that issue have a bearing upon the equities of the parties to this appeal."

"The evidence shows the parties were married on September 28, 1939. Three days prior to the marriage appellant purchased a house and lot from the mother of appellee for the sum of \$4,250, all of which money was furnished by the appellant. A deed was made and executed by appellee's mother on September 26, 1939, conveying the property to appellee and appellant as joint tenants. A short time after the marriage the parties moved into this property as their home. The mother and a brother of appellee also made it their home, and shortly before the suit for divorce was started another relative was preparing to move into the house. The evidence on behalf of appellee tends to show the appellant had been guilty of extreme and repeated cruelty. On cross-examination, appellant attempted to show misconduct upon the part of the wife as tending to refute her claim she had been a true and faithful wife, but this he was not permitted to do. His own testimony, corroborated to a certain extent by disinterested witnesses, showed appellee was in the habit of getting intoxicated and remaining away from home all night. Appellee did not refute all these charges, but the court found that appellee was entitled to a decree of divorce upon the ground above mentioned.

"After the announcement a decree of divorce would be awarded, a hearing was had with respect to the question of alimony. On this question it developed that the purchase price had been delivered to the mother and a deed was prepared making appellant and appellee joint tenants. Appellant denied he gave instructions to this effect. Appellee and her mother testified to the contrary, but they also testified to details of the execution of the deed which are not corroborated either by the person who they claimed made the deed or the notary who took the acknowledgment. Appellee claims that the conveyance in part to her was a gift. The divorce proceedings were started about three months after the marriage. A short time before the divorce, appellee left appellant and as an inducement for her to resume marital relations he turned over to her a Plymouth

The evidence shows the parties were married on August 28, 1933. Three days prior to the marriage appellant purchased a house and lot from the mother of appellee for the sum of \$4,320, all of which money was furnished by the appellant. A deed was made and executed by appellee's mother on September 28, 1933, conveying the property to appellee and appellant as joint tenants. A short time after the marriage the parties moved into this property as their home. The mother and a brother of appellee also made it their home, and shortly before the suit for divorce was started another relative was preparing to move into the house. The evidence on behalf of appellee tends to show the appellant had been guilty of extreme and repeated cruelty. An expert-examination, appellant attempted to show otherwise upon the part of the wife as tending to relate her claim she had been a true and faithful wife, but this he was not permitted to do. His own testimony, corroborated to a certain extent by disinterested witnesses, showed appellee was in the habit of getting intoxicated and remaining away from home all night. Appellee did not refuse all sexual charges, but the court found that appellee was entitled to a decree of divorce upon the ground above mentioned.

"After the announcement a decree of divorce would be awarded, a hearing was had with respect to the question of alimony. On this question it developed that the purchase price had been delivered to the mother and a deed was prepared making appellant and appellee joint tenants. Appellant denied he gave instructions to this effect. Appellee and her mother testified to the contrary, but they also testified to details of the execution of the deed which are not corroborated either by the person who they claimed made the deed or the notary who took the acknowledgment. Appellee claims that the conveyance in part to her was a gift. The divorce proceedings were started about three months after the marriage. A short time before the divorce, appellee left appellant and as an inducement for her to resume marital relations he turned over to her a Plymouth

automobile, but appellee refused to live with him or to return the car. The evidence shows that appellant was possessed of considerable property and money and earnings sufficient to pay reasonable alimony.

"In awarding the husband's part of the real estate and the automobile to appellee the court found the husband had made a gift of the part interest to his wife, and that in order to avoid partition proceedings and other things which might be done to destroy the value of the undivided interest, that she should have all of the real estate in lieu of alimony of any kind.

"The question presented in this case is whether, under section 17 of the Divorce act, (Ill. Rev. Stat. 1939, chap. 40, par. 18,) the court had the power to order this conveyance, and whether, under the facts in the case, he should not have reinvested the title standing in the name of appellee, together with the automobile, in appellant and made provision for alimony, if it was found that appellee was entitled thereto. Section 17 of the Divorce act, supra, provides: 'Whenever a divorce is granted, if it shall appear to the court that either party holds the title to property equitably belonging to the other, the court may compel conveyance thereof to be made to the party entitled to the same, upon such terms as it shall deem equitable.'

"The general rule in this State is that in a divorce proceeding the court will not transfer to the wife, who has prevailed in the suit, the fee simple title to real estate of which the husband is seized, unless the wife shows special equities which would justify it. (Byerly v. Byerly, 363 Ill. 517.) Where the wife makes no contribution to the acquiring of real estate a conveyance to her upon a divorce is not justified, except only in cases of special equity. (Lipe v. Lipe, 327 Ill. 39.) The usual and proper practice, unless special circumstances justify a different course, is to give the wife an allowance, under the control of the court, and not vest the fee of real estate in her. A claim that arises from the marriage relation, alone, is not sufficient. (Weighen v. Weighen, 307 Ill. 306.) Where

automobile, but appellee refused to give him up to return the car. The evidence shows that appellee was possessed of considerable property and money and earnings sufficient to pay reasonable alimony. "In granting the husband's part of the real estate and the automobile to appellee the court found the husband had made a gift of the part interest to his wife, and that in order to avoid partition proceedings and other things which might be done to destroy the value of the undivided interest, what the would have all of the real estate in lieu of alimony of any kind.

"The question presented in this case is whether, under section IV of the divorce act, (Ill. Rev. Stat. 1937, chap. 40, par. 12), the court had the power to order this conveyance, and whether, under the facts in the case, he should not have reinstated the title standing in the name of appellee, together with the automobile, in appellee and made provision for alimony, if it was found that appellee was entitled thereto. Section IV of the divorce act, Ill. Rev. Stat. 1937, chap. 40, par. 12, provides: 'Whenever a divorce is granted, it shall appear to the court that either party holds the title to property equitably belonging to the other, the court may compel conveyance thereof to be made to the party entitled to the same, upon such terms as it shall deem equitable.'

"The general rule in this state is that in a divorce proceeding the court will not transfer to the wife, who was prevailed in the suit, the fee simple title to real estate of which the husband is seized, unless the wife shows special equities which would justify it. (Hyatt v. Hyatt, 303 Ill. 171.) Where the wife makes no contribution to the acquiring of real estate a conveyance to her upon a divorce is not justified, except only in cases of special equity. (Hyatt v. Hyatt, 303 Ill. 171.) The usual and proper practice, unless special circumstances justify a different course, is to give the wife an allowance, under the control of the court, and not vest the fee of real estate in her. A claim that arises from the marriage relation, alone, is not sufficient. (Hyatt v. Hyatt, 303 Ill. 171.) Where

special equities are claimed, justifying the conveyance of the husband's property to the wife, the special circumstances must be alleged in the complaint and established by proof. (Geisler v. Geisler, 336 Ill. 410; Lewis v. Lewis, 315 id. 447.) Where there has been contribution made by the wife, or a gift or voluntary conveyance made to her by the husband, the rule is stated as follows: 'If the wife or husband has property in his own name, acquired solely by him and in his own right and to which the other has not in any way contributed, then it is the right of that party to remain vested with such title. If there is property held by one of them which has been accumulated by the joint efforts of the two or by the funds of both, then such property should be divided according to such equity as exists between them. If either party has, by gift, been invested with property acquired entirely by the one making the gift, then the court may properly revest the title in the party making the gift, without regard to the question of the gift being voluntary or otherwise, or make an equitable division between them.' (Gilbert v. Gilbert, 305 Ill. 216, 222.) The rule in that case is approved in Termaat v. Termaat, 357 Ill. 472.

"Appellant bought and paid for the property in cash before he received a deed. It was purchased from the mother of appellee. The mother and appellee claim that they were directed to have the deed prepared with Earl Bissett and appellee grantees as joint tenants, and that appellant accompanied them to a scrivener to prepare a deed. Appellant denies this, and LaSalle J. DeMichael, the man who appellee claims prepared the deed, denies he had anything to do with it. Likewise the notary who acknowledged the deed contradicts certain testimony of appellee, and says the deed was brought to her for acknowledgment by appellee instead of her mother. Without any specific directions given by appellant the deed of conveyance should have been made to Earl Bissett, as he furnished all of the consideration. Appellee did not contribute anything to the purchase of the property, and, so far as the evidence shows, no property of

Special agents are assigned to investigate the commission of the crime and to the property of the state, the special circumstances and the offender in the commission and maintenance of the crime. (Article 1, Section 1, Constitution of the State of New York)

has been contribution made by one wife, or a gift or voluntary contribution made to her by the husband, the wife is treated as follows:

"If the wife or husband has property in his own name, acquired solely by him and in his own right and to which the other has not in any way contributed, then it is the right of that party to remain vested with such title. If there is property held by one of them which has been accumulated by the joint efforts of the two or by the funds of both,

then such property should be divided according to such rights as exist between them. If either party has, by gift, been invested with property acquired originally by the other making the gift, then the court may properly reverse the title in the party making the gift, without regard to the question of his gift being voluntary or otherwise, or make an equitable division between them. (Hildreth v.

[illegible]

Appellant bought and paid for the property in each before he received a deed. It was purchased from the mother of appellee. The mother and appellee claim that they were directed to have the deed prepared with Earl Misset and appellee trustees as joint tenants, and that appellee accompanied them to a scrivener to prepare a deed. Appellant denies this, and testifies J. Davidson, the man who appellee claims prepared the deed, denies he had anything to do with it. Likewise the notary who acknowledged the deed denies that certain testimony of appellee, and says the deed was brought to her for acknowledgment by appellee instead of her mother, without any specific directions given by appellant the deed of conveyance should have been made to Earl Misset, as he transferred all of the consideration. Appellee did not contribute anything to the purchase of the property, and so this is the evidence shown, no property of

hers was used during the continuance of the marriage relation.

"The relationship lasted about three months, during most of which time two or more of the relatives of the wife were living in the home. The evidence shows appellant had considerable money on hand and other property, and has enjoyed a good income. Under such a showing, no necessity existed for the court to refuse to fix alimony, and no special equities requiring the conveyance of the husband's property to the wife. The complaint does not allege any special equities and none were shown, and the reason given by the court for ordering the conveyance was that it was done to avoid partition proceedings which might destroy the value of the one-half interest claimed to have been made as a gift to Mrs. Bissett. If this was a ground for ordering a transfer of title it would apply with equal force as a reason for a retransfer from the wife to the husband.

"Whether the joint interest standing of record in the name of appellee was procured in disregard of the directions of the appellant or was made as a gift, as claimed by appellee, is immaterial, as it is clear it would not have been made except for the contemplated marriage, and the husband still remains the equitable owner of the property in case of a dissolution of the marriage. Gilbert v. Gilbert, supra; Termaat v. Termaat, supra.

"The evidence shows without dispute that after the appellee had separated from appellant, as an inducement for her to return and resume marital relations, appellant turned over to her a Plymouth automobile, which she retained without ever going back to the home. It is urged that the rule applying to transfers of real estate does not apply to personal property. The statute does not make this distinction, and in Litwin v. Litwin, 375 Ill. 90, under similar circumstances, the court ordered the return to the husband of personal property.

"Under the facts in this case it was error for the court to order a transfer of the one-half interest of the husband to the

...and that during the commission of the marriage relation.
"The relationship between the parties, during most
of which time two or more of the children of the wife were living
in the home. The evidence shows appellant had considerable money
on hand and other property, and was enjoying a good income, and
such a showing, no necessity existed for her court to return to
the alimony, and no special equities requiring the conveyance of
the husband's property to the wife. The complaint does not allege
any special equities and none were shown, and the reason given by
the court for ordering the conveyance was that it was done to avoid
partition proceedings which might destroy the value of the one-half
interest claimed to have been made as a gift to Mrs. Whistler. If
this was a ground for ordering a transfer of title it would apply
with equal force as a reason for a transfer from the wife to the
husband.

"Neither the joint interest standing in record in the name
of appellee was procured in disregard of the directions of the
appellant or was made as a gift, as claimed by appellee, it is imma-
terial, as it is clear it would not have been made except for the con-
templated mortgage, and the husband still retained the equitable
owner of the property in case of a dissolution of the marriage.

Whistler v. Whistler, 111 Ill. 30, 111 Ill. 30, 111 Ill. 30
"The evidence shows without dispute that after the appellee
had separated from appellant, as an independent person to return and
resume marital relations, appellant turned over to her a automobile,
which she retained without ever going back to the home.
It is urged that the rule applying to transfers of real estate does
not apply to personal property. The statute does not make this
distinction, and in Whistler v. Whistler, 111 Ill. 30, under similar
circumstances, the court ordered the return to the husband of
personal property.
"Under the facts in this case it was error for the court
to order a transfer of the one-half interest of the husband to the

wife, and error for the court to refuse to cause to be reconveyed to the husband the interest conveyed to the wife immediately before the marriage, and in not requiring the return of the Plymouth automobile turned over to her as an inducement to resume marital relations

"The decree of the circuit court of Cook county is reversed in the foregoing respects and the cause is remanded, with directions to proceed in a manner not inconsistent with the view expressed herein, and to consider and determine the amount of alimony, if any, to be awarded to appellee.

"Reversed and remanded, with directions."

In view of the foregoing opinion, that part of the instant order that ordered defendant to pay rent for the premises must be reversed. The order was based upon the theory that plaintiff under the decree entered by the Circuit court was the owner of the property. To sustain the rental order entered by the trial court would compel defendant to pay rent to plaintiff for living in his own property, after the Supreme court has held that "it was error for the court to order a transfer of the one-half interest of the husband to the wife, and error for the court to refuse to cause to be reconveyed to the husband the interest conveyed to the wife immediately before the marriage."

Defendant further contends that the trial court erred in ordering him to pay to plaintiff \$250 as an allowance to defend defendant's appeal to the Supreme court. In this connection it will be noted that the said appeal affected only that part of the decree that awarded certain property to plaintiff. At the time of the entry of the order of July 1, 1940, the parties were no longer husband and wife, and the appeal to the Supreme court did not involve alimony or the custody of children. We find nothing in the statute that would justify the trial court in ordering defendant to pay plaintiff's expenses for defending the Supreme court appeal, nor has plaintiff cited any case that would support such an order.

The order of the Circuit court of Cook county of July 1,

Wife, and error for the court to refuse to set aside the judgment
to the husband the husband conveyed to the wife the marital
the marriage, and in fact he never did so. The husband's
mobile turned over to her as an instrument to maintain marital relations.
"The decree of the circuit court of Cook county is reversed
in the foregoing respects and the same is remanded, with directions
to proceed in a manner not inconsistent with the view expressed here-
in, and to consider and determine a question of alimony, if any, to
be awarded to appellee.

"However and remanded, with instructions."
In view of the foregoing opinion, the court of the husband
order that appellee defendant do pay to the plaintiff such
reversal. The court was based upon the fact that plaintiff's
the decree entered by the circuit court was the error of the
properly. To maintain the marital status by the trial court
would compel defendant to pay rent to plaintiff for living in his
own property. After the supreme court has held that the error
for the court to order a judgment of the one-half interest of the
husband to the wife, and error for the court to refuse to cause to
be conveyed to the husband the husband conveyed to the wife
immediately before the marriage."

Notwithstanding further consideration that the trial court erred in
ordering him to pay to plaintiff \$250 as an allowance for the
defendant's appeal to the supreme court. In this connection it
will be noted that the wife appeal filed only two days of the
decree that awarded certain property to plaintiff. At the time of
the entry of the order of July 1, 1930, the parties were no longer
husband and wife, and the appeal to the supreme court did not involve
alimony or the custody of children. We find nothing in the statute
that would justify the trial court in ordering defendant to pay
plaintiff's expenses for defending the supreme court appeal, nor
has plaintiff cited any case that would support such an order.
The order of the circuit court of Cook county of July 1,

1940, wherein it orders defendant to pay rent for the premises in question, and further orders defendant to pay plaintiff \$250 "as and for her expenses during the appeal presented by said Earl Bissett," is reversed.

THAT PART OF THE ORDER DATED JULY 1, 1940,
AS TO PAYMENT OF RENT AND PAYMENT TO PLAIN-
TIF OF \$250, REVERSED.

Friend, P. J., and Sullivan, J., concur.

1940, therein is ordered to pay for the balance of
question, and further ordered to pay balance of the
and for her expenses during the period of her stay
Bissett," is reversed.

THIS CASE ON THE MERITS, 1940,
IS TO REMAIN ON THE MERITS OF THE

Principles, 1940, and Bissett, 1940, consist,

41576

MORRIS AXELROOD, doing business as
the ASHLAND LUMBER COMPANY,

Appellant,

v.

NICK THANOS,

Appellee.

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

309 I.A. 134²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover damages claimed to have been sustained by him by reason of defendant's breach of a written contract. After a trial by the court without a jury the issues were found in favor of defendant and judgment was entered upon the finding. Plaintiff appeals.

Defendant was the owner of a vacant piece of real estate located at the southeast corner of Central and Montrose avenues, Chicago. He desired to erect a building on the premises and on April 9, 1938, entered into the following contract with plaintiff:

"The Undersigned called the Owners, hereby request Ashland Lumber Company called the Contractor, to furnish all labor and material necessary to construct a four (4) store building on the premises located at Southeast corner of Central & Montrose Avenue City Chicago State Illinois, and further described below*, in a neat and workmanlike manner, and according to proposed bid and water color rendering which are hereby a part of this agreement, and allowance of Two Thousand Dollars is figured in total amount for arrearage in taxes, which are to be paid by the contractor out of the proceeds of the loan.

"That in no event shall there be any more charges for architects or any commissions for loan, and the said contractor shall keep the said property free ^{and clear} from any liens by reason of this contract.

"Owners agree to obtain and pay for all building and other permits necessary.

"Owners agree to pay for the above work, complete as speci-

THE UNITED STATES OF AMERICA
DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK

IN SENATE
JANUARY 1938

AGT. A. I. COB

Defendant.

MR. JUSTICE: WHEREAS, the following facts have been

presented to the court by the plaintiff, it is the duty of the court to

ascertain by the testimony of the witnesses and the evidence presented by the defendant, whether or not the defendant is liable for the damages claimed by the plaintiff. It is the duty of the court to determine the facts and to apply the law to the facts.

The plaintiff, the defendant, and the witnesses

testify that the defendant is the owner of a vacant piece of real estate located at the southeast corner of Central and Madison streets, Chicago. It is desired to erect a building on the premises and on April 1, 1938, entered into the following contract with the plaintiff:

"The defendant shall the plaintiff, hereby consent

to the plaintiff's use of the premises, to the plaintiff's use of the premises

and material necessary to construct a four (4) story building on

the premises located at southeast corner of Central and Madison streets

City Chicago State Illinois, and further described below, in a

most and workmanlike manner, and according to the plans and specifications

color rendering which are hereby a part of this agreement, and which

one of two thousand dollars as stated in the contract for the purpose

in time, which are to be paid by the defendant out of the proceeds

of the loan.

"That in no event shall there be any more charges for such-

tests or any commissions for loan, and the said contract shall not

and clear

the said property from any liens by reason of this contract.

"Whereas, the defendant agrees to obtain and pay for all building and other

costs necessary.

"Whereas, the defendant agrees to pay for the above work, complete as speci-

fied the sum of Eighteen Thousand Five Hundred Dollars, as follows:
Fifty Dollars on Date of this Contract

"The balance of the contract price to be paid to the contractor in a manner required by the mortgage firm, subject, however, to obtaining loan and leases. In the event that the loan or leases are not obtained as herein provided, then this contract shall be cancelled and returned to the owner and the said contractor shall retain the said \$50 in full satisfaction of his claim for services rendered in connection with this contract, but the plans and specifications in that event be turned over to the owner herein to be used by him if so desired.

"Date April 9th, 1938

[signed] "Nick Thanos (Seal)
"1456 Foster

"Salesman Wm. D. MacKenzie

"Accepted for Ashland Lumber Company
"By Morris Axelrood Officer of Firm

"I (we) hereby consent to above improvement
"Nick Thanos"

Defendant paid \$50 to plaintiff at the time of the execution of the contract, which sum has been retained by plaintiff. Plaintiff concedes that he did not perform the contract, but claims that defendant breached the contract while plaintiff was "using due and diligent effort to perform the conditions provided for in the contract." On July 8, 1938, defendant, through his attorney, sent the following letter to plaintiff:

"Ashland Lumber Company
"1800 N. Ashland Avenue
"Chicago, Illinois

"Gentlemen:

"I have been informed by Mr. Nick Thanos, the owner of the property located at the South East corner of Montrose and Central Aves., Chicago, Illinois, that you have failed to procure the loan for the erection of the building on the property herein mentioned, and under the provisions of the contract entered into between your

which the sum of \$100,000.00 was paid to the defendant, as follows:

Twenty Dollars on each of the following:

"The balance of the contract shall be paid to the defendant

therein in a manner specified by the defendant, and, however, to obtaining loan and interest. It is the intent that the loan or interest

are not obtained as herein provided, then this contract shall be

cancelled and returned to the owner and this contract shall

remain the same in full satisfaction of the debt for services

rendered in connection with this contract, and the loan and

specifications in and about the same shall be returned to the owner, according to

be used by him in no manner.

"Dated April 20, 1934

(Signed) "John Thomas" (Seal)
John Thomas

"Witness, W. J. Thomas"

"Accepted for John Thomas Company
By John Thomas, Officer of the

"I (we) hereby consent to above improvement
"John Thomas"

Defendant paid \$10 to Plaintiff at the time of the execution

of the contract, which has been retained by Plaintiff. Plaintiff

considers that he has not performed the contract, but claims that

defendant promised the contract while Plaintiff was "making the end

effort to perform the conditions provided for in the con-

tract. On April 19, 1934, defendant, through his attorney, sent the

following letter to Plaintiff:

"John Thomas Company
1111 North La Salle Street
Chicago, Illinois

"Dear Sir:

"I have been informed by Mr. John Thomas, the owner of the

property located at the North West corner of Monroe and Central

Aves., Chicago, Illinois, that you have failed to procure the loan

the execution of the building on the property herein mentioned,

and under the provisions of the contract entered into between you

company and my client on April 9th, 1938, you are to return to him the plans and specifications, blue prints and pictures and the contract to be held null and void and of no effect whatsoever.

"At your convenience, have the plans, specifications, and pictures ready and my client will call to pick them up when you notify him.

"Very truly yours,

"N. P. Conglis"

On August 10, 1938, defendant entered into a contract with the E. E. Mattam Construction Company for the construction of a building similar to the one mentioned in the contract between plaintiff and defendant. Plaintiff contends that defendant was not warranted in cancelling the contract, and that he is entitled to recover damages from defendant. Defendant contends that under the contract plaintiff was to construct a building only on condition that he obtained a building construction loan of \$18,500; that the balance of the contract price(\$18,450) was to be paid defendant in a manner required by the mortgage firm, "subject, however, to obtaining loan and leases;" that plaintiff maintained a financing department, in charge of Arnold A. Rosen, a lawyer, for the purpose of financing building contracts made by plaintiff; that after the contract was made, plaintiff, through Rosen and another employee, attempted to make the building construction loan and submitted plans, specifications and water colors, prepared by plaintiff and approved by defendant, to various mortgage houses in Chicago, but all of them refused to make the loan; that about May 10, 1938, defendant suggested to plaintiff that a loan might be obtained from Irvin Jacobs & Company; that an application to that firm was made and negotiations in reference to the loan were carried on for a period of about six weeks, but the loan was refused. Defendant testified that thereafter, on several occasions, plaintiff informed him that it was impossible for him to make the required loan; that

company and my client on April 24th, 1938, you are to return to him the plans and specifications, blue prints and pictures and the contract to be held null and void and of no effect whatsoever.

"At your convenience, have the plans, specifications, and pictures ready and my client will call to pick them up when you

"W. F. Connelley"

On August 10, 1938, defendant entered into a contract with the W. F. Connelley Construction Company for the construction of a building similar to the one mentioned in the contract between plaintiff and defendant. Plaintiff contends that defendant was not warranted in cancelling the contract, and that he is entitled to recover damages from defendant. Defendant contends that under the contract plaintiff was to construct a building only on condition that he obtained a building construction loan of \$18,000; that the balance of the contract price (\$18,400) was to be paid defendant in a manner required by the mortgage firm, "subject, however, to obtaining loan and leases;" that plaintiff maintained a financing department, in charge of Arnold A. Rosen, a lawyer, for the purpose of financing building contracts made by plaintiff; that after the contract was made, plaintiff, through Rosen and another employee, attempted to make the building construction loan and submitted plans, specifications and water colors, prepared by plaintiff and approved by defendant, to various mortgage houses in Chicago, but all of them refused to make the loan; that about May 10, 1938, defendant suggested to plaintiff that a loan might be obtained from Irvin Jacobs & Company; that an application to that firm was made and negotiations in reference to the loan were carried on for a period of about six weeks, but the loan was refused. Defendant testified that thereafter, on several occasions, plaintiff informed him that it was impossible for him to make the required loan; that

about June 15 or 20, 1938, defendant called at plaintiff's office and Rosen expressed his regrets that the loan was not secured, and told him that the plans were at the office of Irvin Jacobs & Company and defendant could call for them there. That Company, after contacting plaintiff's office, turned the plans over to defendant. Plaintiff's evidence tended to prove that he had submitted the loan to a number of prominent firms in Chicago but failed to secure the loan from said firms; that plaintiff, at the request of defendant, contacted the firm of Irvin Jacobs & Company in an effort to secure the loan. Rosen, a witness for plaintiff, stated that in the matter of loans of the character of the one in question it was not uncommon for the applicant to be compelled to submit applications for the loan to as many as "twenty different loaning agencies;" that about July 6, 1938, defendant told him that he had arranged for the financing of the construction of the building; that he was to get between \$6,000 and \$8,000 cash from the sale of a building he owned; that plaintiff was to get started on the building and that there would be no difficulty in getting the balance of the money needed by way of a mortgage. This testimony of Rosen as to the said conversation was more or less corroborated by two other witnesses who testified for plaintiff. Defendant denied in toto the testimony as to the alleged conversation with Rosen. Plaintiff made no answer to defendant's letter of July 8, 1938, and, so far as we can find from the record, made no protest to defendant in respect to the cancellation of the contract. Hattam Construction Company started the construction of the building about Labor Day, 1938.

Plaintiff contends that the contract was drawn by defendant's attorney, that there is an ambiguity in it as to which party should obtain the building loan, and that the law is that defendant, under the circumstances, was obliged to procure the loan. Defendant's answer to this contention is that the parties to the instant contract by their conduct placed a construction upon the provision in question, that the said construction was a reasonable one and such construction

will be adopted by the court. This last principle of law is well established and requires no citations to support it. In the instant case the trial court evidently believed that the evidence showed that plaintiff assumed the burden of obtaining the loan, and after a careful study of the record we are of the opinion that the trial court was justified in so finding.

Plaintiff testified that he had a financing department which attended to the financing of deals that might come in; that Arnold A. Rosen, a lawyer, was at the head of this department. During the examination of plaintiff the following occurred: "Q. Now, from April 9, 1938, to and including July 8, 1938, did you obtain a loan for Mr. Thanos for the proposed building which was to be erected by you for him? A. As I told you before, Mr. Rosen was in charge of obtaining the loan and making all the arrangements for the financial end of it." Rosen, a witness for plaintiff, testified that he was employed by plaintiff "as attorney and head of the Finance Department. My duties, in connection with the financing department was to attempt to get financing on our various contracts that came in. I had a series of men under me, who would go out under my direction to see various banks and financing institutions. I was familiar with the Nick Thanos deal. I had occasion to contact various banks or loan, or mortgage houses, for the purpose of attempting to secure financing on this property." The witness further testified that he could not remember the names of all of the mortgage houses that he applied to in connection with the attempt to secure the loan; that he did not attempt to finance the matter through banks, but only through mortgage houses.

Plaintiff argues that defendant did not give him a reasonable time to secure the loan and that he acted arbitrarily and unreasonably in cancelling the contract at the time that he did. We think that the trial court would be justified in finding that defendant did not act unreasonably and arbitrarily, as plaintiff contends. About May 10, 1938, after plaintiff had made a number of unsuccessful efforts to

will be adopted by the court. This fact principle of law is well established and requires no citation to support it. In the instant case the trial court evidently believed that the evidence showed that plaintiff assumed the burden of obtaining the loan, and after a careful study of the record we are of the opinion that the trial court was justified in so finding.

Plaintiff testified that he had a financing department which attended to the financing of deals that might come up that would A. Rosen, a lawyer, was at the head of this department. During the examination of plaintiff the following occurred: "Q. Now, from April 9, 1938, to and including July 8, 1938, did you obtain a loan for Mr. Thannos for the proposed building which was to be erected by you for Mrs. A. As I told you before, Mr. Rosen was in charge of obtaining the loan and making all the arrangements for the financial end of it." Rosen, a witness for plaintiff, testified that he was employed by plaintiff "as attorney and head of the Finance Department. My duties, in connection with the financing department was to attempt to get financing on our various contracts that came in. I had a series of men under me, who would go out under my direction to see various banks and financing institutions. I was familiar with the Nick Thannos deal. I had occasion to contact various banks or loan, or mortgage houses, for the purpose of attempting to secure financing on this property." The witness further testified that he could not remember the names of all of the mortgage houses that he applied to in connection with the attempt to secure the loan; that he did not attempt to finance the matter through banks, but only through mortgage houses.

Plaintiff argues that defendant did not give him a reasonable time to secure the loan and that he acted arbitrarily and unreasonably in cancelling the contract at the time that he did. We think that the trial court would be justified in finding that defendant did not act unreasonably and arbitrarily, as plaintiff contends. About May 10, 1938, after plaintiff had made a number of unsuccessful efforts to

secure the loan, defendant suggested to plaintiff that a loan might be obtained through Irvin Jacobs & Company, and for about six weeks thereafter plaintiff endeavored to secure a loan through that firm, but the loan was finally refused. This was the last company that plaintiff contacted in an effort to secure the loan. It is admitted that defendant aided plaintiff in his negotiations with the Jacobs Company. Furthermore, the trial court evidently believed the testimony of defendant to the effect that about June 15 or June 20, 1938, Rosen expressed his regrets that plaintiff had been unable to secure the loan and told defendant that he might call at the office of Irvin Jacobs & Company and obtain the plans. Robert E. Jordon, who was connected with Irvin Jacobs & Company in 1938, but who was an employee of the Cadillac Motor Car Division at the time of the trial, testified that before the plans were turned over to defendant, Blackstone (an assistant of Rosen) told him to let defendant have the plans. The trial court was justified, in our judgment, in finding that plaintiff abandoned the contract. It must be remembered in this connection that although plaintiff had a lawyer at the head of his financing department, no answer was made to the letter of July 8, 1938, nor was there, so far as the record shows, any protest or objection made to the cancellation of the contract. There is nothing in the record to indicate that plaintiff made any effort to contact defendant after he received the said letter. After a painstaking examination of the record we are satisfied that we would not be justified in holding that the finding and judgment of the trial court are against the manifest weight of the evidence.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

secure the loan, defendant suggested to plaintiff that a loan might be obtained through Irving Jacob & Company, and for about six weeks thereafter plaintiff endeavored to secure a loan through that firm, but the loan was finally refused. This was the last company that plaintiff contacted in an effort to secure the loan. It is admitted that defendant aided plaintiff in his negotiations with the Jacob Company. Furthermore, the trial court evidently believed the testimony of defendant to the effect that about June 14 or June 20, 1936, Rosen expressed his regrets that plaintiff had been unable to secure the loan and told defendant that he might call on the office of Irving Jacob & Company and obtain the plans, Robert H. Jordan, who was connected with Irving Jacob & Company in 1936, but who was an employee of the Cadillac Motor Car Division at the time of the trial, testified that before the plans were turned over to defendant, Blackstone (an assistant of Rosen) told him to let defendant have the plans. The trial court was justified, in our judgment, in finding that plaintiff abandoned the contract. It must be remembered in this connection that although plaintiff had a lawyer at the head of his financing department, no answer was made to the letter of July 8, 1936, nor was there, so far as the record shows, any protest or objection made to the cancellation of the contract. There is nothing in the record to indicate that plaintiff made any effort to contact defendant after he received the said letter. After a painstaking examination of the record we are satisfied that we would not be justified in holding that the finding and judgment of the trial court are against the manifest weight of the evidence.

The judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

WILLIAM H. HARRIS, J., and WILLIAM H. HARRIS, J., concur.

40475

LA SALLE MORTGAGE & DISCOUNT
COMPANY, a corporation,

Appellee,

v.

CONTINENTAL ILLINOIS NATIONAL
BANK AND TRUST COMPANY OF CHICAGO,
as trustee, etc., et al., and
LEO MOSER.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

309 I.A. 135

VERA DE SAMBAD,

Appellant.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This case was consolidated for hearing in this court with case No. 40476. Complaint was filed herein for partition of certain real estate situated in the city of Chicago, which constituted the corpus of a trust created by the will of John A. Packard, of which trust one of the defendants, Continental Illinois National Bank and Trust Company, was the trustee. The trust expired on August 17, 1936, the date of distribution fixed in and by the Packard will and this suit was filed on the following day. One of the defendants, Vera De Sambad (hereinafter for convenience referred to as the defendant), appellant herein, was served by publication and defaulted. The decree of partition was entered November 25, 1936, upon the report and recommendation of the master in chancery, which decree adjudged that defendant had no interest in the property and an order of proposed distribution of the proceeds of the sale of the property to persons other than defendant was thereafter entered on May 18, 1937, on a subsequent report of the master. On May 27, 1937, by leave of court, defendant filed a petition alleging her interest in the subject matter and praying that the decree of partition be vacated, that she be permitted to be heard and share in the proceeds of the sale of the real estate and for general relief. On August 20, 1937, by leave of court, defendant filed certain "Amendments" to the petition to vacate theretofore filed by her

IN SALES MORTGAGE & TRUST COMPANY, a corporation,

HONORABLE JAMES M. WALKER, JUDGE OF THE CIRCUIT COURT OF CLACK COUNTY, MISSOURI, et al., and

VERA DE SALAS,

Appellant.

NO. 10,000 WILLIAM H. WALKER, JR. PLAINTIFF VS. THE STATE

This case was consolidated for hearing in this court as case No. 40478. Complaint was filed herein for partition of certain real estate situated in the city of Chicago, which consisted of the corpus of a trust created by the will of John A. Packard, of which trust one of the defendants, Continental Illinois National Bank and Trust Company, was the trustee. The trust expired on August 17, 1936, the date of distribution fixed in and by the Packard will and this will was filed on the following day, the 18th of the defendant, Vera de Salas (hereinafter for convenience referred to as the defendant), appellant herein, was served by publication and default. The decree of partition was entered November 23, 1936, upon the report and recommendation of the master in chancery, which decree adjudged that defendant had no interest in the property and an order of proposed distribution of the proceeds of the sale of the property to persons other than defendant was thereupon entered on May 13, 1937, on a subsequent report of the master. On May 27, 1937, by leave of court, defendant filed a petition alleging her interest in the subject matter and praying that the decree of partition be vacated, that she be permitted to be heard and share in the proceeds of the sale of the real estate and for general relief. On August 20, 1937, by leave of court, defendant filed certain "Amendments" in the petition so various exceptions filed by her

on May 27, 1937. On May 13, 1938, an order was entered by the trial court dismissing defendant's petition to vacate and the amendments thereto for want of equity. By her appeal defendant seeks to reverse the order of May 13, 1938, which dismissed her petition to vacate and the amendments thereto for want of equity. She also appeals from the decree of partition of November 25, 1936, and the order of proposed distribution of May 18, 1937.

The complaint of plaintiff, La Salle Mortgage and Discount Company, alleged inter alia that John A. Packard died testate August 19, 1898, and by his will devised the real estate involved herein (501 Plymouth court, Chicago) to his daughter, Felicia M. Norris, for life, and upon her death to the defendant Continental Illinois National Bank & Trust Company of Chicago (then Illinois Trust & Savings Bank) in trust, to pay the net income to her children equally for the period of twenty-one years after her death, whereupon distribution was to be made to her descendants as provided by the laws of descent of the state of Illinois; that Felicia M. Norris died August 17, 1915, leaving surviving her two grandsons, Harry C. Norris, Jr., and John P. Norris, both of whom survived the twenty-one year period specified in the Packard will.

In plaintiff's complaint the interest of defendant in the real estate involved was set forth as follows:

"11. On or about October 24, 1933, the said John P. Norris executed an instrument in writing, purporting to assign to one Vera De Sambad his interest in his 'legacy' under the said last will and testament of the said John A. Packard, deceased, to the extent of \$3,730. The said John P. Norris likewise executed a direction in writing, to Continental Illinois National Bank and Trust Company of Chicago, a corporation, as trustee under the said last will and testament of said John A. Packard, deceased, to make payment of said sum of \$3,730 to said Vera De Sambad. The said instrument in writing dated October 24, 1933, and the accompanying direction in writing, hereinbefore referred to, were thereafter filed for record in the office of the recorder of deeds of Cook County, Illinois, on November 23, 1934, as document number 11508985. A true copy of said recorded document (consisting of said instrument in writing dated October 24, 1933, and said accompanying direction in writing), and of the certificate of recordation thereof, is attached hereto, marked 'Exhibit E.' Plaintiff is informed and believes, and therefore so states the fact to be, that the said Vera De Sambad claims and has an interest, to the extent of any amount justly unpaid under the said assignment to said Vera De Sambad, in the one-half interest in the hereinbefore described

premises which would now have accrued to the said John P. Morris under the provisions of the said last will and testament of said John A. Packard, deceased, had said John P. Morris not parted with said one-half interest accruing to him, in the manner hereinafter set forth." (Italics ours.)

"13. On or about October 24, 1935, or subsequent thereto, the said John P. Morris executed an instrument in writing, purporting to assign to one Clara B. Anderson, the sum of \$400 payable out of any share of the said John P. Morris in the net income from the said trust created under the said last will and testament of said John A. Packard, deceased. Thereafter, the said Clara B. Anderson executed a purported assignment bearing date November 18, 1935, to Vera De Sambad (hereinafter referred to) of all the right, title and interest of the said Clara B. Anderson under the hereinbefore described instrument in writing, executed by John P. Morris, referred to in this paragraph of this complaint. The said purported assignment executed by the said Clara B. Anderson was written at the foot of the said instrument in writing executed by said John P. Morris; and said entire instrument was thereafter, on February 14, 1935, filed for record in the office of the recorder of deeds of Cook County, Illinois, as document number 11567850. A true copy of the said entire instrument in writing, containing the purported assignment by said John P. Morris, and the further purported assignment of said Clara B. Anderson, is attached hereto, marked 'Exhibit 1.' Plaintiff is informed and believes, and therefore so states the fact to be, that the said Vera De Sambad by reason of the matters in this paragraph of this complaint alleged, claims and has an interest, to the extent of any portion of said sum of \$400 justly owing and unpaid, in the one-half interest in the hereinbefore described premises which would now have accrued to the said John P. Morris under the provisions of the said last will and testament of said John A. Packard, deceased, had said John P. Morris not parted with said one-half interest accruing to him, in the manner hereinafter set forth." (Italics ours.)

The complaint also alleged other assignments made by John P. Morris of his interest in the trust estate and that on November 9, 1935, he and plaintiff, La Salle Mortgage and Discount Company, entered into an assignment agreement whereby the latter acquired all the remaining interest which John P. Morris then had as a beneficiary under the will of John A. Packard.

The complaint further alleged:

"25. The several parties to this suit are therefore entitled to the ownership of the fee simple title to all of the herein described real estate in the following manner, to-wit:

"1. The plaintiff, La Salle Mortgage & Discount Company, a corporation, is entitled to the ownership in fee simple of an undivided one-half interest in the hereinbefore described premises,

"The said interest of the plaintiff La Salle Mortgage & Discount Company, a corporation, in the fee simple title to the said premises is further subject to the rights of the following

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the said Court at the City of Chicago, this 1st day of January, 1935.

"12. On or about October 15, 1934, an assignment was made by John P. Morris to one John P. Morris, the son of John P. Morris, of the said John P. Morris in the sum of \$10,000.00, the said John P. Morris created under the said last will and testament of said John P. Morris, deceased, the said John P. Morris executed a purported assignment bearing date November 12, 1934, to and in favor of the said John P. Morris, of all the right, title and interest of the said John P. Morris, under the heretofore described instrument in writing, assigned by John P. Morris, referred to in this paragraph of this complaint. The said purported assignment executed by the said John P. Morris was written as the foot of the said instrument in writing executed by said John P. Morris; and said assignment was executed by said John P. Morris, as document number 12,750, A of books of Cook County, Illinois, as document number 12,750, A true copy of the said instrument in writing, containing the purported assignment by said John P. Morris, and the father and mother of said John P. Morris, is attached to this complaint as Exhibit A.

"13. The said John P. Morris, as document number 12,750, A of books of Cook County, Illinois, as document number 12,750, A true copy of the said instrument in writing, containing the purported assignment by said John P. Morris, and the father and mother of said John P. Morris, is attached to this complaint as Exhibit A. The said John P. Morris, as document number 12,750, A of books of Cook County, Illinois, as document number 12,750, A true copy of the said instrument in writing, containing the purported assignment by said John P. Morris, and the father and mother of said John P. Morris, is attached to this complaint as Exhibit A. The said John P. Morris, as document number 12,750, A of books of Cook County, Illinois, as document number 12,750, A true copy of the said instrument in writing, containing the purported assignment by said John P. Morris, and the father and mother of said John P. Morris, is attached to this complaint as Exhibit A.

The complaint also alleged other assignments made by John P. Morris of his interest in the trust estate and that on November 1935, he and plaintiff, as John P. Morris and Account Company, entered into an assignment agreement whereby the latter executed and entered into an assignment agreement which John P. Morris then had as a beneficiary under the will of John A. Packard.

"14. The several parties to this suit are heretofore entitled to the ownership of the fee simple title to all of the herein described real estate in the following manner, to-wit:

"1. The plaintiff, as John P. Morris, as document number 12,750, A of books of Cook County, Illinois, as document number 12,750, A true copy of the said instrument in writing, containing the purported assignment by said John P. Morris, and the father and mother of said John P. Morris, is attached to this complaint as Exhibit A. The said John P. Morris, as document number 12,750, A of books of Cook County, Illinois, as document number 12,750, A true copy of the said instrument in writing, containing the purported assignment by said John P. Morris, and the father and mother of said John P. Morris, is attached to this complaint as Exhibit A.

"The said interest of the plaintiff in John P. Morris, as document number 12,750, A of books of Cook County, Illinois, as document number 12,750, A true copy of the said instrument in writing, containing the purported assignment by said John P. Morris, and the father and mother of said John P. Morris, is attached to this complaint as Exhibit A. The said John P. Morris, as document number 12,750, A of books of Cook County, Illinois, as document number 12,750, A true copy of the said instrument in writing, containing the purported assignment by said John P. Morris, and the father and mother of said John P. Morris, is attached to this complaint as Exhibit A.

named persons, as hereinbefore in this complaint set forth, which said persons following are entitled to priorities among themselves, in the order named:

"First: Alvina Morris, whose rights are set forth in the paragraph numbered 9 in this complaint.

"Second: Vera De Sambad, whose rights are set forth in the paragraph numbered 10 of this complaint.

"Third: Kenneth H. Myers, whose rights are set forth in the paragraph numbered 12 of this complaint.

"Fourth: Vera De Sambad, whose rights are set forth in the paragraph numbered 13 of this complaint.

"26. Plaintiff desires a division and partition of the said premises, according to the respective rights of the persons interested therein."

Answers were filed by the other defendants having an interest in the trust property but as heretofore stated defendant was served by publication and defaulted and the complaint was taken pro confesso as to her on October 2, 1936.

In accordance with the report of the master the decree of partition entered November 25, 1936, stated in Paragraph 11 thereof that "the evidence fails to establish that any sums of money remain owing to said Vera De Sambad under the said instruments or agreements, and the court finds that nothing is owing to said Vera De Sambad under any of said instruments or agreements hereinabove described," and in Paragraph 14 thereof that "no sums of money are remaining owing to the said defendant Vera De Sambad under the said assignments herein referred to and described."

The master's report of the proposed distribution of the proceeds of the partition sale, which included a finding that plaintiff made an assignment to one L. Moser on May 12, 1939, "of all the sums payable to plaintiff out of the proceeds of the sale, and as yet unpaid," was approved by an order entered May 18, 1937.

As heretofore stated, defendant, by leave of court, filed her petition on May 27, 1937, to vacate the decree of partition, alleging her interest in the premises as shown by the two assignments to her and as set forth in Paragraphs 11 and 13 of plaintiff's complaint. Her petition then alleged:

named persons, as hereinafter in this complaint set forth, which said persons following are entitled to interests in the estate in the other estate;

"First: Alvin Karpis, whose rights are set forth in the paragraph numbered 9 of this complaint.

"Second: Vera De Landau, whose rights are set forth in the paragraph numbered 10 of this complaint.

"Third: Kenneth E. Moore, whose rights are set forth in the paragraph numbered 12 of this complaint.

"Fourth: Vera De Landau, whose rights are set forth in the paragraph numbered 13 of this complaint.

"Fifth: Plaintiff desires a division and partition of the said premises, according to the respective rights of the persons interested therein.

Answers were filed by the other defendants having an interest in the trust property but as heretofore stated defendant was served by publication and defaulted and the complaint was taken pro confesso as to her on October 2, 1936.

In accordance with the report of the Master the decree of

partition entered January 12, 1937, failed to mention II interest

that "the evidence fails to establish that any sums of money remain

owing to said Vera De Landau under the said instruments or agree-

ments, and the court finds that nothing is owing to said Vera De Landau

under any of said instruments or agreements heretofore described."

and in paragraph 14 thereof that no sums of money are remaining owing to the said defendant Vera De Landau under the said assignments herein

referred to and described."

The Master's report of the proposed distribution of the pro-

ceeds of the partition sale, which included a finding that Plaintiff

made an assignment to one E. Moore on May 12, 1937, for all the sums

payable to Plaintiff out of the proceeds of the sale, and as yet un-

paid, was approved by an order entered May 12, 1937.

As heretofore stated, defendant, by leave of court, filed her

petition on May 27, 1937, to vacate the decree of partition, alleging

her interest in the premises as shown by the two assignments to her

and as set forth in Paragraphs 11 and 13 of Plaintiff's complaint.

Her petition then alleged:

"That your petitioner is not, and was not at the time of filing the said suit, a resident of the State of Illinois; that she was never served with summons or served with a copy of the complaint or otherwise brought into court, and never received the notice required to be sent to her by mail in the event of service by publication, and was never served with a copy of the decree entered herein or given notice of the entry of a decree herein, and that your petitioner did not appear or take part in the said suit or submit any evidence.

"That your petitioner is the rightful owner of and entitled to a portion of the proceeds from the sale of the real estate described in the said complaint, now being held for distribution to those entitled thereto.

"That on or about November 28, 1936, a decree was entered herein finding the said John F. Norris executed the above mentioned assignments and that the same had been recorded, as above stated, but found that the evidence fails to establish that any sums of money were due under the said assignments."

Defendant's petition concluded with the prayer that "she be permitted to file her appearance herein, and to be heard touching the matter of the said decree; that the petitioner be permitted to submit evidence of the money due her under the said assignments and that this cause be set down for hearing or referred to the Master in Chancery for such purpose; that she be permitted to share in the proceeds from the said sale of the said real estate as her interest may appear, that the said decree be vacated and modified in the foregoing respects, and that your petitioner have such further relief as to the Court shall seem proper."

The order granting her leave to file said petition was as follows: "This day comes Vera De Sambad, one of the defendants herein, on notice to the attorneys of record for the several parties hereto, and moves the court for leave to file instant her petition herein, under subsection 3 of section 50 of the Civil Practice Act of 1933, and it is thereupon ordered that said defendant Vera De Sambad be and she is hereby given leave to file her said petition herein instant; and said petition is accordingly filed here."

It will be noted that defendant's petition sought only to vacate the decree entered "on or about November 28, 1936," which was the decree of partition. Her petition was filed under subsection 3 of section 50, Civil Practice Act (Ill. Rev. Stats. 1937, par. 174, ch. 110), which provides:

"When any final decree in chancery shall be entered against any defendant who shall have been served by publication with notice of the commencement of the suit and who shall not have been served with a copy of the complaint, or received the notice required to be

sent him by mail, or otherwise brought into court, and such person, his heirs, devisees, or personal representatives, as the case may require, shall within ninety days after such notice in writing given him of such decree, or within one year after such decree, if no such notice shall have been given as aforesaid, appear in open court and petition to be heard touching the matter of such decree, the court shall upon notice being given to the parties to said suit who appeared therein and the purchaser at a sale made pursuant to such decree, or their solicitors, set such petition down for hearing and may allow the parties and such purchaser to answer such petition. If upon the hearing upon said petition it shall appear that such decree ought not to have been made against such defendant, the same may be set aside, altered or amended as shall appear just. ***"

Thus the sole ground alleged in defendant's petition for the vacation of the decree of partition was that defendant "was not at the time of filing the said suit a resident of the state of Illinois" and that she "never received the notice required to be sent to her by mail in the event of service by publication." If the facts so alleged were true, she had one year under the statute within which to file her petition to vacate.

Plaintiff filed an answer to defendant's petition in which it denied "that the said petitioner never received the notice required to be sent to her by mail in the event of service by publication."

Having been informed sometime after said petition to vacate had been filed that defendant had received the notice of the commencement of the suit required to be sent to her by mail in the event of service by publication, her counsel on August 20, 1937, filed by leave of court certain "Amendments To Petition of Vera De Sambad."

In her "Amendments" defendant struck from her original petition to vacate the allegation "or otherwise brought into court, and never received the notice required to be sent to her by mail in the event of service by publication." She then alleged:

"That prior to the filing of the above entitled suit your petitioner, through her attorney at Los Angeles, California, placed in the hands of Frederic Ullmann, her attorney herein, for attention and collection, her claims and interest against and in the Estate of the said John A. Packard, deceased, and the property devised and bequeathed by his said Last Will and Testament, growing out of the assignments and occurrences aforesaid, that the said Frederic Ullmann turned the said claims and interest over to R. H. McBride, an attorney in his employ, for attention, and that the said R. H. McBride on various occasions thereafter communicated with the said Continental

National Bank & Trust Company of Chicago, as Trustee under the Last Will and Testament of John A. Packard, deceased, with reference thereto, and conferred with the representatives of the said Trust Company who were in charge of the said estate; that after the filing of the said suit Maurice L. Davis, attorney for the plaintiff therein, called the said R. H. McBride on the telephone in the month of August, 1936, and in substance stated to him that he had been informed by the said Trust Company that the said R. H. McBride's office represented your petitioner in her said claims and interest and inquired whether he would enter the appearance of your petitioner in the said suit, thus avoiding the necessity for publication, but that the said R. H. McBride was not at that time able to state whether or not he could enter her appearance; that the said R. H. McBride obtained from the said Maurice L. Davis a copy of the complaint filed in the said suit and informed the said Frederic Ullman of the substance thereof, that the said Frederic Ullmann thereupon informed your petitioner's attorney at Los Angeles of the filing of the said suit, and that the latter thereafter authorized the said Frederic Ullman to take such steps as he might deem necessary on your petitioner's behalf, informing him at the same time that your petitioner had not as yet received a copy of a publication notice; that, by reason of the fact that the said Continental Illinois National Bank & Trust Company of Chicago, as Trustee under the Last Will and Testament of John A. Packard, deceased, was under the duty of protecting the interests of the beneficiaries of the trust created by the said will, including your petitioner as assignee of the said John F. Morris, whose rights as such assignee had been recognized by the said Trustee by the payment to her of \$490 on or about December 1, 1934, pursuant to the terms of the said assignments and in other ways, and by reason also of the fact that the complaint filed in the said suit correctly sets forth the above mentioned assignments to your petitioner and states that the plaintiff is informed and believes and therefore so states the fact to be that your petitioner claims and has an interest to the extent of any amount justly unpaid and owing to her under the said assignments, and further by reason of the fact that the said Maurice L. Davis had communicated with the said R. H. McBride as aforesaid concerning the entry of your petitioner's appearance in the said suit, the said R. H. McBride did not regard the said suit as an adverse or hostile proceeding and did not anticipate that any attack would be made therein upon your petitioner's plain claims and interest aforesaid, or any objection or opposition made to the proper allowance and establishment thereof, that thereafter, on or about September 8, 1936, the said Continental Illinois National Bank & Trust Company of Chicago, as Trustee as aforesaid, wrote to your petitioner a letter in words and figures as follows:

"September 8, 1936.

Mrs. Vera DeSambad,
1759 N. Bronson Avenue,
Hollywood, California.

Dear Mrs. DeSambad:

You no doubt have been informed of the filing of suits in the Circuit Court of Cook County, Illinois, in the Estate of John A. Packard, Deceased, as follows:

LaSalle Mortgage and Discount Company, a corporation v.
Continental Illinois National Bank and Trust Company of Chicago,
et al. No. 36C-9086

LaSalle Mortgage and Discount Company, a corporation v.
Continental Illinois National Bank and Trust Company of Chicago,
et al. - No. 36C-9087

National Bank & Trust Company of Chicago, as trustee under the last will and testament of John A. Packard, deceased, with reference thereto, and conveyed with the representatives of the said bank Company who were in charge of the said estate; that when the filing of the said will was made, A. Davis, attorney for the plaintiff therein, called the said E. H. McBride on the telephone in the month of August, 1936, and in substance stated to him that he had been informed by the said bank Company that the said E. H. McBride's office represented your petitioner in her said claims and that said McBride would enter the appearance of your petitioner in the said suit, thus avoiding the necessity for publication, but that the said E. H. McBride was not at that time able to state whether or not he could enter her appearance; that the said E. H. McBride obtained from the said Lawrence J. Davis a copy of the complaint filed in the said suit and informed the said Frederick Blumenson, attorney at law, that the said Frederick Blumenson thereupon informed your petitioner's attorney at law, and that the latter thereafter authorized the said Frederick Blumenson to take such steps as he might deem necessary on your petitioner's behalf, informing him at the same time that your petitioner had not as yet received a copy of a publication notice; that by reason of the fact that the said Continental Illinois National Bank & Trust Company of Chicago, as trustee under the last will and testament of John A. Packard, deceased, was under the duty of protecting the interests of the beneficiaries of the trust created by the said will, including your petitioner as assignee of the said John A. Packard, whose rights as such assignee had been recognized by the said trustee by the payment to her of \$400 on or about December 1, 1934, pursuant to the terms of the said assignments and in other ways, and by reason also of the fact that the complaint filed in the said suit correctly sets forth the above mentioned assignments to your petitioner and that the said complaint is in fact and in law and therefore so states the fact to be that your petitioner claims and has an interest to the extent of any amount legally unpaid and owing to her under the said assignments, and further by reason of the fact that the said E. H. McBride as attorney for your petitioner's appearance in the said suit, the said E. H. McBride did not regard the said suit as an adversary or hostile proceeding and did not anticipate that any attack would be made therein upon your petitioner's plain claims and interest aforesaid, or any objection or opposition to the same, your petitioner on or about September 3, 1936, the said Continental Illinois National Bank & Trust Company of Chicago, as trustee as aforesaid, wrote to your petitioner a letter in words and figures as follows:

September 3, 1936

THE TRUST COMPANY
1710 N. DEARBORN STREET
CHICAGO, ILLINOIS

Dear Sir, Enclosed is a copy of the report of the Circuit Court of Cook County, Illinois, in the estate of John A. Packard, deceased, as follows:

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
Continental Illinois National Bank & Trust Company of Chicago, Inc., Plaintiff
vs.
E. H. McBride, Defendant

LaSalle Mortgage and Discount Company, Inc., Plaintiff
vs.
Continental Illinois National Bank & Trust Company of Chicago, Inc., Defendant

The matter of answering and further steps in court in connection with these proceedings has been referred to Messrs. Mayer, Meyer, Austrian and Platt, 231 So. LaSalle Street, Chicago, Illinois, counsel representing us.

Very truly yours,
(signed) A. E. Burton,
Trust Department."

that thereafter, without notice to your petitioner or to any of her attorneys, aforesaid, and before either the said Frederic Ullman or the said R. H. McBride had been informed of the receipt by your petitioner of any notice required to be sent to her by mail in the event of service by publication, the said suit was brought on for hearing and a decree entered and other proceedings had therein; that early in the month of October, 1936, the said Frederic Ullman was taken with a severe cold, which necessitated his temporary absence from the office, and upon his return to the office became engaged in preparations for leaving the City early in November and arranging for the handling of various matters during his absence, all of which placed an additional burden on the said R. H. McBride; that on or about November 9, 1936, the said Frederic Ullman left the City and was absent therefrom until on or about April 2, 1937, and that in consequence thereof the said R. H. McBride was compelled to attend to many matters which the said Frederic Ullmann would otherwise have attended to, and which necessitated the expenditure of much time and effort and subjected the said R. H. McBride to an unusual burden and strain; that early in the year 1937 the wife of the said R. H. McBride became ill and required much of his time and attention, and in the month of February, 1937, departed this life; that upon the return of the said Frederic Ullmann to Chicago in April, 1937, it became necessary for him and for the said R. H. McBride to make preparations for moving and to move their offices; and that neither the said Frederic Ullmann nor the said R. H. McBride received any further notice or word concerning the said suit, or had any knowledge of the said hearing or decree or other proceedings therein until May, 1937, when the said R. H. McBride, in examining the docket and records of this Court, ascertained that a decree had been entered and other pro-

ceedings had in the said suit, and that the said R. H. McBride thereupon prepared and filed the said petition on behalf of your petitioner."

Plaintiff filed an answer denying all the material allegations of defendant's amendments to the petition to vacate.

Defendant's contentions as stated in her brief are "that none of the decrees or orders became final in either case until the court dismissed her petition to vacate, that the notice of appeal was filed in apt time, that since the complaint in each case correctly set forth defendant's interest, her default was not an admission that she had no interest, that by reason of this allegation of the complaint no evidence to the contrary would have been admissible, and the court erred in decreeing to the contrary, that the burden was on plaintiff both to allege and prove that defendant had no interest, that in a partition suit, as well as in an accounting suit, the court should, before finding that defendant had no interest, set the matter for hearing on that issue and order that defendant be notified thereof, though in default, that on the complaint and evidence the court should have decreed that defendant had an interest and fixed the amount thereof and erred in not so decreeing, that the defendant, in her petition to vacate, as amended, showed sufficient grounds therefor, that the decrees should have been opened up and defendant permitted to be heard, and that it was error to dismiss the petition."

The first question presented is whether the trial court had jurisdiction to vacate the decree for partition of November 25, 1936, or the order of proposed distribution of May 18, 1937, upon defendant's petition to vacate of May 27, 1937, or the amendments to said petition of August 20, 1937.

Defendant's petition of May 27, 1937, to vacate the decree of November 25, 1936, having been filed under subsection 8 of section 50 of the Civil Practice Act, solely on the ground that she had not received the required notice of the institution of the suit and it later being admitted that she had received such notice in apt time, the remedy provided under said section of the statute,

proceedings had in the said suit, and that the said A. A. Johnson
thereupon prepared and filed the said petition on behalf of her
petitioner."

Plaintiff filed an answer denying all the material allegations--

allegations of defendant's amendments to the petition to vacate.

Defendant's contentions as stated in her brief are "that

none of the decrees or orders became final in either case until the
court dismissed her petition to vacate, that the notice of appeal was

filed in apt time, that since the complaint in each case correctly

set forth defendant's interest, her default was not an admission

that she had no interest, that by reason of this allegation of the

complaint no evidence to the contrary would have been admissible,

and the court erred in decreeing to the contrary, that the burden

was on plaintiff both to allege and prove that defendant had no

interest, that in a partition suit, as well as in an accounting suit,

the court should, before finding that defendant had no interest, set

the matter for hearing on that issue and order that defendant be

notified thereof, though in default, that on the complaint and evi-

dence the court would have found that defendant had no interest.

and fixed the amount thereof and erred in not so decreeing, that the

defendant, in her petition to vacate, as amended, showed sufficient

grounds therefor, that the decrees should have been opened up and

defendant permitted to be heard, and that it was error to dismiss

the petition."

The first question presented is whether the trial court had

jurisdiction to vacate the decree for partition of November 25, 1936,

or the order of proposed distribution of May 18, 1937, upon defendant's

petition to vacate of May 27, 1937, or the amendments to said petition

of August 20, 1937.

Defendant's petition of May 27, 1937, to vacate the decree

of November 25, 1936, having been filed under subsection 3 of

section 90 of the Civil Practice Act, solely on the ground that

she had not received the required notice of the institution of the

suit and it later being admitted that she had received such notice

in apt time, the remedy provided under said section of the statute,

which might be pursued within one year from the entry of said decree was, of course, not available to her. Inasmuch as defendant's original petition to vacate did not attack and was not directed against the order of proposed distribution of May 18, 1937, it was not effective for any purpose.

In dismissing defendant's petition and the amendments thereto, the trial court made the following statement, with which we are in accord:

"I have examined the petition that was presented in May and also the order entered on it, and a fair reading of the petition and the order convinces me that the intent of the lady was to vacate the decree, and that was the only purpose. She was permitted to come in on the theory that she had not received the notice that had been mailed by the clerk and therefore she had a right to be heard within a year.

"Apparently then in August counsel learned that the notice sent by the clerk had been received by his client, and he came in and filed an amendment or a supplemental petition *** seeking to have his rights determined. However, that amounted in effect to an abandonment of his previous position."

Having been compelled to abandon the only position taken by her in her original petition to vacate, defendant then filed her amendments to said petition under subsection 7 of section 50 of the Civil Practice Act (Ill. Rev. Stats. 1937, Par. 174, Chap. 110), which provides:

"The court may in its discretion before final judgment, set aside any default, and may within thirty days after entry thereof set aside any judgment or decree upon good cause shown by affidavit upon such terms and conditions as shall be reasonable."

The final decree of partition entered November 25, 1936, could not be vacated on a motion made under the foregoing section of the statute on May 27, 1937, which was long after the thirty days allowed by said statute for the presentation of such motion.

We are impelled to hold that defendant's petition to vacate the decree for partition and the amendments to said petition were properly dismissed by the trial court. However, the order of dismissal of May 13, 1938, should be modified by striking therefrom the words "want of equity."

which might be pursued within one year from the entry of said decree was, of course, not available to her. Defendant's motion was

and petition to vacate did not state and was not directed against

the order of proposed distribution of May 18, 1938, it was not

effective for any purpose.

In dismissing defendant's petition and the amendments thereto,

the trial court made the following statement, with which we are in

accord:

"I have examined the petition that was presented in May and also the order entered on it, and a fair reading of the petition and the order convinces me that the intent of the lady was to vacate the decree, and that was the only purpose. She was permitted to come in on the theory that she had not received the notice that had been mailed by the clerk and therefore she had a right to be heard within a year.

"Apparently then in August counsel learned that the notice sent by the clerk had been received by his client, and he came in and filed an amendment or a supplemental petition *** seeking to have his rights determined. However, that amounted in effect to an abandonment of his previous position."

Having been compelled to abandon the only position taken by

her in her original petition to vacate, defendant then filed her

amendments to said petition under subsection 7 of section 30 of the

Civil Practice Act (Ill. Rev. Stats. 1937, Par. 174, Chap. 110),

which provides:

"The court may in its discretion before final judgment, set aside any decree, and may award costs and attorney's fees and set aside any judgment or decree upon good cause shown by affidavit upon such terms and conditions as shall be reasonable."

The final decree of partition entered November 25, 1936,

could not be vacated on a motion made under the foregoing section of

the statute on May 28, 1938, which was long after the thirty days

allowed by said statute for the presentation of such motion.

We are impelled to hold that defendant's petition to vacate

the decree for partition and the amendments to said petition were

properly dismissed by the trial court. However, the order of dis-

missal of May 18, 1938, should be modified by striking therefrom

the words "want of equity."

As already stated the original petition to vacate of May 27, 1937, was not directed against the order of proposed distribution of May 18, 1937, and a careful examination of the amendments to said petition filed August 20, 1937, discloses that not a single allegation contained therein was directed against the order of proposed distribution. This being so, defendant's petition to vacate and the amendments thereto were entirely unavailing in so far as the order of proposed distribution of May 18, 1937, was concerned.

Plaintiff's motion heretofore made that defendant's appeal from the decree of partition and the order of proposed distribution be dismissed was reserved to hearing. That motion is now allowed. The decree for partition entered November 25, 1936, was a final adjudication as to the rights of the parties and defendant's right to appeal therefrom within ninety days had expired long before she filed her original petition to vacate on May 27, 1937. As heretofore shown, this petition, having been filed more than thirty days after the decree of partition was entered, was not legally effective for any purpose. It is readily apparent that merely because the petition to vacate was not passed upon until May 13, 1938, that the pendency thereof did not extend defendant's right to appeal from the decree of partition ninety days from May 13, 1938, when defendant's petition to vacate and the amendments thereto were finally dismissed. Defendant's notice of appeal from the decree of partition was filed July 14, 1938, more than a year and one half after the entry of said decree on November 25, 1936, and the appeal from that decree must therefore be dismissed.

Defendant contends that her motion to vacate of May 27, 1937, was filed within thirty days of the entry of the order of proposed distribution of May 18, 1937, and that, therefore, since the order dismissing her motion to vacate and the amendments thereto was not entered until May 13, 1938, she had ninety days from the latter date within which to file her notice of appeal and that she had an absolute right to file it within such time. The difficulty with defendant's

As already stated the original petition in vacate of May 27, 1937, was not received by the court of proposed distribution of May 14, 1937, and a subsequent order of the court to said petition filed August 22, 1937, directed that not a single affidavit contained therein was directed against the order of proposed distribution. This being so, defendant's petition to vacate and the amendments thereto were entirely unavailing and so far as the order of proposed distribution of May 14, 1937, was concerned.

DEFENDANT'S MOTION TO REVOKE AND SET ASIDE THE ORDER OF PROPOSED DISTRIBUTION

From the decree of partition and the order of proposed distribution be dissolved was reserved to hearing. That motion is now allowed. The decree for partition entered November 27, 1936, was a final adjudication as to the rights of the parties and defendant's right to appeal therefrom within ninety days had expired long before she filed her original petition to vacate on May 27, 1937. As heretofore shown, this petition, having been filed more than ninety days after the decree of partition was entered, was not legally effective for any purpose. It is readily apparent that merely because the petition to vacate was not passed upon until May 13, 1938, that the ninety-day period did not extend defendant's right to appeal from the decree of partition ninety days from May 13, 1938, when defendant's petition to vacate and the amendments thereto were timely filed. Defendant's notice of appeal from the decree of partition was filed July 14, 1938, more than a year and one half after the entry of said decree on November 27, 1936, and the appeal from that decree must therefore be dismissed.

Defendant contends that her motion to vacate of May 27, 1937, was filed within ninety days of the entry of the order of proposed distribution of May 14, 1937, and that, therefore, since the order dissolving her motion to vacate and the amendments thereto was not entered until May 13, 1938, she had ninety days from the latter date within which to file her notice of appeal and that she had an absolute right to file it within such time. The difficulty with defendant's

position in this regard is that her original petition to vacate of May 27, 1937, was not directed to the order of proposed distribution of May 18, 1937, but solely to the decree of partition. As already shown the only relief that she sought therein was the vacation of said decree of partition on the ground that she had received no notice of any kind of the filing of the suit in which the decree was entered. The amendments filed by defendant on August 20, 1937, to her petition to vacate were not directed against the order of proposed distribution either. Thus there was no motion or petition presented at any time to vacate the order of proposed distribution of May 18, 1937. It necessarily follows that defendant's right to appeal from the order of May 18, 1937, had to be exercised under the statute within ninety days from the entry of such order. Her notice of appeal from the order of May 18, 1937, not having been filed until July 14, 1938, must necessarily be dismissed.

Other points are urged but in the view we take of this case we deem it unnecessary to discuss them.

It may well be that defendant was wrongfully deprived of substantial rights in the trust estate involved herein, but as has been shown she is not entitled to a hearing on the merits under her petition to vacate and the amendments thereto filed in this cause nor a review of the merits under her notice of appeal because nei her her petition to vacate nor her notice of appeal were filed within the time prescribed by the Civil Practice Act.

stated

For the reasons herein the order of the Circuit court of May 13, 1938, as modified, dismissing defendant's motion to vacate and the amendments thereto is affirmed and the appeal of defendant from the decree for partition of November 25, 1936, and the order of proposed distribution of the proceeds of the partition sale of May 18, 1937, is dismissed.

ORDER OF MAY 13, AS MODIFIED, AFFIRMED,
APPEAL FROM DECREE OF NOVEMBER 25, 1936,
AND ORDER OF MAY 18, 1937, DISMISSED.

Friend, P. J., and Scanlan, J., concur.

position in this regard is that the defendant's motion to vacate of May 27, 1937, was not directed to the order of proposed distribution of May 18, 1937, but solely to the decree of partition. It is shown the only relief that she sought therein was the vacation of said decree of partition on the ground that she had received no notice of any kind of the filing of the bill in which the decree was entered. The amendments filed by defendant on August 20, 1937, to her petition to vacate were not directed against the order of proposed distribution either. There was no motion or petition presented at any time to vacate the bill of proposed distribution of May 18, 1937. It follows that defendant's right to appeal from the order of May 18, 1937, had to be exercised under the statute within ninety days from the entry of such order. Her notice of appeal from the order of May 18, 1937, was not filed until May 27, 1937, and is hereby dismissed.

Other points are urged but in the view we take of this case we deem it unnecessary to discuss them. It may well be that defendant was wrongfully deprived of substantial rights in the trust estate involved herein, but as has been shown she is not entitled to a hearing on the merits under her petition to vacate and the amendments thereto filed in this cause nor a review of the merits under her notice of appeal because neither her petition to vacate nor her notice of appeal were filed within the time prescribed by the Civil Practice Act.

For the reasons herein the order of the circuit court of May 13, 1936, as modified, dismissing defendant's motion to vacate and the amendments thereto is affirmed and the appeal of defendant from the decree for partition of November 23, 1936, and the order of proposed distribution of the proceeds of the partition sale of May 18, 1937, is dismissed.

ORDER OF MAY 13, AS MODIFIED, AFFIRMED,
APPEAL FROM DECREE OF NOVEMBER 23, 1936,
AND ORDER OF MAY 18, 1937, DISMISSED.

WELLS, P. J., and GORDON, J., concur.

40476

LA SALLE MORTGAGE & DISCOUNT
COMPANY, a corporation,

Appellee,

v.

CONTINENTAL ILLINOIS NATIONAL
BANK & TRUST COMPANY OF CHICAGO,
as trustee, etc., et al., and
LEO MOSER,

Appellees.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

309 I.A. 136

VERA De SAMBAD,

Appellant.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This case was consolidated for hearing in this court with case No. 40475 and this opinion is filed concurrently with the opinion in that case.

The allegations of the complaint herein are identical with the allegations of the complaint in case No. 40475 as to defendant's interest and the manner in which such interest accrued.

The complaint here, after alleging that plaintiff, defendant and others were entitled to an accounting from the trustee, asked that said trustee, Continental Illinois National Bank & Trust Company of Chicago, be required to account for the income, profits and rentals in its hands from the trust property "in order to effect a distribution of the sums accounted for, among the plaintiff, La Salle Mortgage & Discount Company, a corporation, and the defendants Alvina Morris, Vera De Sambad, Kenneth H. Myers, Ida E. Rose, North River Mortgage Company, a corporation, and Jonathan Holdeen, in accordance with their rights and interests as set forth in this complaint, and as the same may be determined, upon hearing herein, justly to exist: *** the intent of the plaintiff being that any decree made herein shall be for the benefit of the plaintiff, La Salle Mortgage & Discount Company, a corporation, and said defendants Alvina Morris, Vera De Sambad, Kenneth H. Myers,

IN CHIEF CLERK'S OFFICE

RECEIVED
JAN 10 1938
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK, N.Y.

THE UNITED STATES OF AMERICA

vs.

JOHN J. BROWN, Defendant.

Complaint.

With the allegations of the complaint in case No. 4047 as to

defendant's interest and the manner in which such interest accrued.

The complaint here, after alleging that plaintiff, before

and others were entitled to be accounted from the trustee, asked

that said trustee, defendant, should be ordered to account

Company of Chicago, be required to account for the income, profits

and rentals in the hands of the trust property "in order to

effect a distribution of the same according to, among the plain-

tiff, La Salle Mortgage & Discount Company, a corporation, and

the defendants Alvin Morris, Vera De Banded, Kenneth E. Myers,

the plaintiff, La Salle Mortgage & Discount Company, a corporation,

and said defendants Alvin Morris, Vera De Banded, Kenneth E. Myers,

as set forth in this complaint, and as the same may be determined,

upon hearing herein, justly to exist: and the intent of the plain-

tiff being that any decree made herein shall be for the benefit of

the plaintiff, La Salle Mortgage & Discount Company, a corporation,

and said defendants Alvin Morris, Vera De Banded, Kenneth E. Myers,

Ida E. Rose; North River Mortgage Company, a corporation, and Jonathan Woldeen, in accordance with their rights and interests as set forth in this complaint, and as the same may be determined, upon hearing herein, justly to exist."

The Trustee attached to its answer a statement of its account, which was thereafter offered in evidence before the master in chancery and approved in his report.

On November 28, 1936, a decree was entered which approved the master's report as to the accounting made by the trustee and ordered a rereference to the master to determine the rights of the parties in the matter of the distribution of the fund of \$4,175.70 accounted for by the trustee and deposited with the clerk of the court.

The master's report of distribution ignored any interest defendant may have had in the fund accounted for by the trustee and recommended that said fund be distributed to plaintiff's assignee and one other person.

On May 18, 1937, an order was entered by the court approving the master's report of proposed distribution in so far as it pertained to plaintiff's assignee.

On May 27, 1937, defendant filed a petition under subsection 8 of section 50 of the Civil Practice Act to vacate the decree entered "on or about November 28, 1936," which was identical with the petition to vacate filed by her in case No. 40475, a copy of said last mentioned petition having been undoubtedly filed inadvertently herein. The decree approving the accounting of the trustee was not a final determination as to defendant's interest in the funds accounted for and her petition to vacate could serve no useful purpose in attacking that decree. Nevertheless that was the decree against which her petition to vacate was directed. The order of proposed distribution of May 18, 1937, was a final determination as to defendant's interest in the fund accounted for by the trustee but defendant's petition to vacate was not directed

The trustee had defendant's petition to vacate was not directed
the trustee as to defendant's interest in the fund accounted for by
order of proposed distribution of May 16, 1937, was a final deter-
mination as to defendant's interest in the fund accounted for by
the trustee as to defendant's interest in the fund accounted for by
no useful purpose in seeking that decree. Nevertheless that was
in the funds accounted for and her petition to vacate could serve
trustee was not a final determination as to defendant's interest
adversely therein. The decree approving the accounting of the
said last mentioned petition having been subsequently filed in-
the petition to vacate filed by her in case no. 40-77, a copy of
entered "on or about November 28, 1936," which was identical with
tion 3 of section 30 of the Civil Practice Act to vacate the decree
May 17, 1937, defendant filed a petition under subse-
pertained to plaintiff's assignees.
ing the master's report of proposed distribution in so far as it
On May 18, 1937, an order was entered by the court approv-
assignee and one other person.
and recommended that said fund be distributed to plaintiff's
defendant may have had in the fund accounted for by the trustee
The master's report of distribution ignored any interest
clerk of the court.

against that order nor was any mention made of same in said petition.

The amendments of August 20, 1937, to defendant's petition to vacate filed by her under subsection 7 of section 50 of the Civil Practice Act are identical with the amendments to her petition to vacate filed by her in case No. 40475. Neither these amendments nor a single allegation contained therein mention the order of proposed distribution of May 18, 1937, and it cannot be said under any fair construction of said amendments that they were directed against that order. We are impelled to hold that defendant did not present a motion in this cause at any time to vacate the order of proposed distribution of May 18, 1937, and that the order of May 13, 1938, dismissing defendant's petition to vacate and the amendments thereto was properly entered. However, the order of May 13, 1938, should be modified by striking therefrom the words "want of equity."

Defendant's notice of appeal from the order of May 18, 1937, not having been filed until July 14, 1938, her appeal from said order must necessarily be dismissed.

It may well be that defendant was wrongfully deprived of substantial rights in the income from the trust estate involved herein, but as has been shown she was not entitled to a hearing on the merits on the final order of proposed distribution of May 18, 1937, since no motion to vacate that order was presented at any time and she is not entitled to have that order reviewed on the merits since her notice of appeal from same was not filed within the time prescribed by the Civil Practice Act.

For the reasons stated herein the order of the Circuit court of May 13, 1938, as modified, dismissing defendant's petition to vacate and the amendments thereto, is affirmed and defendant's appeal from the order of proposed distribution of May 18, 1937, is dismissed.

ORDER OF MAY 13, AS MODIFIED, AFFIRMED.
APPEAL FROM ORDER OF MAY 18, 1937,
DISMISSED.

Friend, P. J., and Scanlan, J., concur.

against that order was not a motion under 21 of the Rules.
The amendments of May 13, 1937, to defendant's petition to

vacate filed by her under subsection 7 of section 10 of the Civil
Practice of the District Court was identical with the amendments to her petition to
vacate filed by her in case no. 40-44. It is shown these amendments were
a single allegation concerning the order of proposed

distribution of May 13, 1937, and it cannot be said under any theory
construction of said amendments that they were directed against that

order. We are inclined to hold that defendant did not present a motion
in this cause at any time to vacate the order of proposed distribution

of May 13, 1937, and that the order of May 13, 1937, dismissing defendant's
petition to vacate and the amendments thereto was properly

entered. However, the order of May 13, 1937, should be notified by
stating therefrom the words "want of equity."

Defendant's notice of appeal from the order of May 13, 1937,
not having been filed until July 14, 1938, her appeal from said order

was necessarily dismissed.
It may well be that defendant was wrongfully deprived of sub-

stantial rights in the income from the trust estate involved herein,
but as has been shown she was not entitled to a hearing on the merits

on the final order of proposed distribution of May 13, 1937, since no
motion to vacate that order was presented at any time and she is not

entitled to have that order reviewed on the merits since her notice
of appeal from same was not filed within the time prescribed by the

Civil Practice Act.
For the reasons stated herein the order of the District Court

of May 13, 1937, is modified, dismissing defendant's petition to
vacate and the amendments thereto, is affirmed and defendant's appeal

from the order of proposed distribution of May 13, 1937, is dis-
missed.

ORDER OF MAY 13, AS MODIFIED, AFFIRMED,
APPEAL FROM ORDER OF MAY 13, 1937,
DISMISSED.

Friend, J. L., and Counsel, J. J. Conner.

40691

JOHN E. RYAN,
Appellant,

v.

DAVID SAUL KLAFTER,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

309 I.A. 136

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This suit was brought by plaintiff, John E. Ryan, on a note for \$5,000 executed by one Edward Solomon and upon an extension agreement entered into by defendant, David Saul Klafter, and others.

The note involved herein was one of three like notes, each for \$5,000, all executed by Edward Solomon and maturing May 20, 1930. On said date an extension agreement was entered into by Louis H. Klein, Harry Fried and Herbert Goldman, the then owners of the three notes, and Edward Solomon, Goldye Solomon, Mathilda Klafter and David Saul Klafter. This agreement extended the maturity of the notes for two years and under the terms thereof the defendant, Klafter (and the other three defendants who executed that instrument with him), assumed and agreed to pay the principal amount of all said notes and all interest due thereon. The case was tried before a jury, which returned a verdict in favor of defendant. The court reserved its ruling on plaintiff's motion for a directed verdict made before the submission of the case to the jury and thereafter plaintiff's motions for judgment notwithstanding the verdict, in arrest of judgment and for a new trial were entered and continued. On October 27, 1938, plaintiff's motion for a new trial was granted. On November 23, 1938, the defendant moved to vacate the order of October 27, 1938, allowing a new trial and on December 23, 1938, the motion to vacate the order granting a new trial was sustained by the trial court. At the same time orders were entered over--

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... this suit was brought by defendant, John M. Ryan, on a note for \$5,000 executed by one Edward Solomon and upon an extension agreement entered into by defendant, David and Klatter, and others.

The note involved herein was one of three like notes, each for \$5,000, all executed by Edward Solomon and bearing date 30, 1930. On said date an extension agreement was entered into by Louis E. Klein, Harry Fried and Herbert Goldman, the then owners of the three notes, and Edward Solomon, Goldys Solomon, Melvin Klatter and David Klatter. This agreement extended the maturity of the notes for two years and under the terms thereof the defendant, Klatter (and the other times defendants who executed this instrument with him), assumed and agreed to pay the principal amount of all said notes and all interest and thereon. The case was tried before a jury, which returned a verdict in favor of defendant. The court reversed its ruling on plaintiff's motion for a directed verdict made before the submission of the case to the jury and thereafter plaintiff's motions for judgment notwithstanding the verdict, in arrest of judgment and for a new trial were denied and continued. On October 27, 1932, plaintiff's motion for a new trial was granted. On November 23, 1932, the defendant moved to vacate the order of October 27, 1932, allowing a new trial and on December 23, 1932, the motion to vacate the order granting a new trial was sustained by the trial court. At the same time orders were entered over-

ruling plaintiff's motion for judgment notwithstanding the verdict, in arrest of judgment and for a new trial, and judgment was entered on the verdict. Originally there were four defendants. One was never served, the suit was dismissed as to one and judgment was taken as to defendant ^{Edward}/Solomon. Therefore, this appeal deals only with defendant Klafter.

Plaintiff appeals from the orders entered December 23, 1928, vacating the order of October 27, 1938, overruling plaintiff's motions for judgment notwithstanding the verdict, in arrest of judgment, and for a new trial, and from the judgment entered on the same day on the verdict of the jury.

The pertinent portions of the extension agreement, which was attached to and made a part of plaintiff's statement of claim, are as follows:

"MEMORANDUM OF AGREEMENT, Made and entered into this Twentieth day of May, 1930, between LOUIS H. KLEIN, HARRY S. FRIED and HERBERT GOLDMAN, of the County of Cook and State of Illinois, parties of the first part, and EDWARD SOLOMON and GOLDBY SOLOMON, his wife, and DAVID SAUL KLAFTER and MATHILDA KLAFTER, a spinster, of the County of Cook and State of Illinois, parties of the second part;

"WITNESSETH, WHEREAS, said parties of the first part are the legal owners and holders of the certain three promissory notes made by EDWARD SOLOMON, Dated July 1, 1927, in the sum of Fifteen Thousand (\$15,000) Dollars, payable May 20, 1930, after said date, which notes are secured by a deed of trust from EDWARD SOLOMON to MORRIS E. FEINWELL, Trustee, conveying the premises situated in the County of Cook and State of Illinois. [Description follows.]

"AND WHEREAS, said second parties desire to have the payment of FIFTEEN THOUSAND (\$15,000) Dollars of said notes of FIFTEEN THOUSAND (\$15,000) Dollars extended for two (2) years from May 20, 1930, in consideration of the agreement hereinafter made on their part:

"NOW, THEREFORE, said parties of the first part agree to extend the payment of FIFTEEN THOUSAND (\$15,000) Dollars of said notes of FIFTEEN THOUSAND (\$15,000) Dollars for two (2) years from May 20, 1930, that is to say until on or before May 20, 1932, so long as the said parties of the second part shall promptly pay interest thereon from May 20, 1930, at the rate of six (6%) per cent per annum, payable semiannually, at the place in said notes mentioned, and shall further keep and perform all and singular the covenants and agreements in said notes and trust deed contained.

"And the said parties of the second part hereby agree to

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...the ... of ...

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and accept said extension upon the conditions aforesaid and have executed twelve (12) interest notes or coupons of One Hundred Fifty (\$150) Dollars each, evidencing and securing the interest on said notes for the time of such extension, and hereby assume and agree to pay the said principal amount of Fifteen Thousand (\$15,000) Dollars at the maturity of said principal notes in accordance with the terms of this extension agreement, and to further keep and perform all and singular the covenants and agreements in said three principal promissory notes and in the trust deed securing the same contained, and further agree that in case of default in the payment of any one of said installments of interest or in case of the failure to keep and perform any one of the covenants and agreements in said notes or in said trust deed contained, the extension herein granted shall, at the option of the first parties, become null and void, and the said principal indebtedness shall at once become due and payable and may be collected without notice, together with all accrued interest thereon at the rate of seven (7%) per cent per annum, anything hereinabove to the contrary notwithstanding.

"IT IS FURTHER AGREED, That this agreement shall be binding upon and inure to the heirs, executors, administrators and assigns of both parties hereto." (*italics ours.*)

Defendant's statement of defense denied that he was the owner of any interest in the real estate described in the extension agreement and alleged that he did not execute the original notes and that there was a total failure and lack of consideration. This defense was stricken on plaintiff's motion.

Defendant filed an amended defense to plaintiff's amended statement of claim which was substantially to the same effect as his first defense except that it alleged in addition that plaintiff had shown no right to sue on the extension agreement. This amended defense was likewise stricken for insufficiency on plaintiff's motion.

Defendant filed a second amended defense, which alleged in addition to what had theretofore been alleged in his original and amended defense that the defendant Klawter had at first refused to sign the extension agreement; that the then owners of the three notes stated that it would be to their advantage to have defendant execute the same; that said then owners of the three notes entered into an agreement in writing with the defendant assuring him that they would not at any time proceed against him for the enforcement of any personal obligation on the extension agreement; and that plaintiff is not a bona fide holder of the note but acquired same after maturity with notice of said agreement by the original holders

of the note releasing Klafter from personal liability thereon.

Pursuant to an order entered by the court on plaintiff's motion, defendant filed the following bill of particulars to the second amended defense:

"The Defendant, David Saul Klafter, states that he is one of the Defendants in the above entitled cause; and that the following is a substantial copy of the written instrument referred to in paragraph two (2) of the 'Second Amended Defense To The Amended State of Claim And Amendment Thereto,' in the above entitled cause:

May 20, 1930.

Mr. David Saul Klafter,
100 North LaSalle Street,
Chicago, Illinois.

Dear Sir:

The undersigned, Louis N. Klein, Harry N. Fried and Herbert Goldman, being the holders and owners of certain notes in the aggregate principal sum of Fifteen Thousand (\$15,000) Dollars secured by a second mortgage on the vacant property more fully described as follows [description of property], which said mortgage is now due.

We, the undersigned and each of us do hereby agree that in consideration of your executing the Extension Agreement extending the said notes secured by the second mortgage referred to hereinabove, that we and each of us, will not at any time or under any circumstances proceed against you, David Saul Klafter, for the enforcement of any personal obligation on said Extension Agreement, dated this 20th day of May, A. D. 1930.

Louis N. Klein
Harry N. Fried
Herbert Goldman."

The foregoing draft of the letter to Klafter included in the bill of particulars does not purport to be an actual copy of the letter which ^{he} claims to have received in 1930 from Klein, Fried and Goldman, the then holders of the notes, but is merely a letter prepared by Klafter's attorney, stating the supposed contents of such letter from information given to his attorney by Klafter. Defendant's second amended defense was stricken for insufficiency on plaintiff's motion.

Plaintiff filed a third amended defense, which denied that he was the owner of any interest in the real estate described in the extension agreement and that he executed same and assumed any personal obligation thereunder in consideration of the extension

of the note releasing William Brown personal liability thereon,
Plaintiff to an order entered by the court on Plaintiff's
motion, defendant filed the following bill of particulars to

the second amended bill of particulars:

"The defendant, David Earl Kiefer, being the owner of the
of the defendant in the above entitled cause; and that the
following is a substantial copy of the written instrument re-
ferred to in paragraph two (2) of the second amended bill of
to the amended bill of claim and account thereon, in the
first amended bill of particulars:

May 20, 1930,

Mr. David Earl Kiefer,
100 North LaSalle Street,
Chicago, Illinois.

Dear Sir:

The undersigned, Louis A. Kiefer, Henry E. Kiefer and
Harold Goldham, being the holders and owners of certain notes
in the aggregate principal sum of fifteen thousand (\$15,000)
dollars secured by a second mortgage on the second property
more fully described as follows: Description of property,
which said mortgage is now due,

we, the undersigned and each of us do hereby agree that
in consideration of your executing the extension agreement
extending the said notes secured by the second mortgage referred
to heretofore, that we and each of us, will now and then or
until any time we have agreed to extend the said notes,
for the enforcement of any personal obligation in said extension
agreement, dated this 20th day of May, A. D. 1930.

Louis A. Kiefer
Henry E. Kiefer
Harold Goldham

The foregoing bill of the latter to Kiefer, contained in the
bill of particulars now set forward to be an actual copy of the
letter which states to have received in 1930 from Kiefer, Kiefer and
Goldham, the three holders of the notes, but is really a letter pro-
vided by Kiefer's attorney, stating the proposed contents of each
letter from information given to his attorney by Kiefer. Goldham
and a second amended defense was written for Kiefer's use on
Plaintiff's motion.

Plaintiff filed a third amended defense, which stated that
he was the owner of any interest in the real estate described in
the extension agreement and that he executed same and assumed any
personal obligation thereunder in consideration of the extension

granted therein. It repeated the allegations as to the purported letter from Klein, Fried and Goldman to him set forth in the bill of particulars to his previous statement of defense.

Plaintiff's theory as stated in his brief is that "no matter of defense is contained in the record; that there is no proof of the execution or of the contents of the supposed agreement claimed by defendant; that there is no evidence in the record upon which the verdict of the jury could be based; that the record conclusively shows that even though there has been an agreement, defendant would still be liable for the full amount sued for, according to his own version of the contents of that agreement in three affidavits filed by him; that even though such agreement had been proved, it does not constitute a defense to this suit since a covenant not to sue one of two or more joint obligors does not amount to a release of the covenantee or of the other obligors."

Defendant's theory is that there was sufficient competent evidence in the record as to the release of defendant from the liability assumed by him in the extension agreement to warrant the jury in finding a verdict in his favor and that "plaintiff failed to allege or prove a prima facie case because there is no allegation nor any proof that the plaintiff had or claimed any interest" in the extension agreement.

Upon the trial of this cause after the defendant Klafter had identified a certified photostatic copy of the extension agreement heretofore set forth and his signature thereon, same was offered and received in evidence. Plaintiff testified that he had never seen the original extension agreement but that he had seen a certified copy thereof and that the original had been recorded, but he was unable to locate it. Plaintiff introduced in evidence the principal note for \$5,000 signed by Edward Solomon and an extension interest coupon for \$150 signed by Edward Solomon, David Saul Klafter, Mathilda Klafter and Goldye Solomon. It was stipulated upon the trial that if plaintiff was entitled to recover from defendant, the

presented therein. It appears that the allegations as to the purported letter from Klein, Fried and Solomon to him set forth in the bill of particulars to the previous statement of defense.

Plaintiff's theory as stated in his brief is that the

matter of defense is contained in the record; that there is no proof of the execution or of the contents of the supposed agreement claimed by defendant; that there is no evidence in the record upon which the verdict of the jury could be based; that the record conclusively shows that even though there has been an agreement, defendant would still be liable for the full amount sued for, according to his own version of the contents of that agreement in those affidavits filed by him; that even though such agreement had been proved, it does not constitute a defense to this suit since a covenant not to sue one of two or more joint obligors does not amount to a release of the covenantee or of the other obligors."

Defendant's theory is that there was sufficient competent evidence in the record as to the release of defendant from the liability assumed by him in the extension agreement to warrant the jury in finding a verdict in his favor and that "Plaintiff failed to allege or prove a prima facie case because there is no allegation nor any proof that the plaintiff had or claimed any interest" in

THE EXTENSION AGREEMENT.

Upon the trial of this cause after the testimony of Klein had identified a certified photostatic copy of the extension agreement heretofore set forth and his signature thereon, same was offered and received in evidence. Plaintiff testified that he had never seen the original extension agreement but that he had seen a certified copy thereof and that the original had been recorded, but he was unable to locate it. Plaintiff introduced in evidence the principal note for \$7,000 signed by Edward Solomon and an extension interest upon the same signed by Klein, Fried and Solomon. It was stipulated upon the trial that if plaintiff was entitled to recover from defendant, the

amount due on the note, including principal and interest, was \$7,634.40.

The only defense which defendant sought to prove upon the trial was that prior to his signing the extension agreement whereunder he assumed and agreed to pay the indebtedness declared upon, defendant had received a certain letter purportedly signed by Klein, Fried and Goldman and supposedly stating in effect that they agreed not to institute suit against him to enforce the obligation assumed by him in the extension agreement. This letter was not produced at the trial, defendant claiming that it had been filed away among some of his papers and lost. Klafter and three other witnesses testified that diligent search was made for the letter and that it could not be found.

Defendant testified that he had the letter which he claims to have received from Klein, Fried and Goldman, a day or two before he signed the extension agreement; that he never talked to Klein, Fried or Goldman about anything in connection with this matter; and that he did not know who prepared the supposed last letter but that he assumed it was prepared at Solomon's request since all his negotiations were with him. He then offered in evidence his attorney's reproduction of the supposed letter, which has been heretofore set forth, but the court excluded same.

Defendant further testified that he had been intimately acquainted with real estate matters for twenty years and knew "the language used in such papers;" that he had dictated "those papers" many times himself; that he gave his lawyer the gist of the lost letter he claims to have received from Klein, Fried and Goldman; and that his lawyer then prepared the kind of a document that he (the lawyer) "would have drawn to carry out that purpose."

Defendant identified three affidavits of merits filed by him in a case brought by one Sadie Klein against David Saul Klafter, which was a suit on the other two notes referred to in the extension agreement. These affidavits, which are in evidence in this case,

amount due on the note, including principal and interest, was

17,350.00.

The only defense which defendant sought to prove upon the trial was that prior to his signing the extension agreement, under he assumed and agreed to pay the indebtedness described above, defendant had received a certain letter purportedly signed by Hirsch, Fried and Goldman and supposedly stating in effect that they agreed not to institute suit against him to enforce the obligation assumed by him in the extension agreement. This letter was not produced at the trial, defendant claiming that it had been filed away among some of his papers and lost. Hirsch and Goldman and other witnesses testified that diligent search was made for the letter and that it could not be found.

Defendant testified that he had the letter which he claims to have received from Hirsch, Fried and Goldman, a day or two before he signed the extension agreement; that he never talked to Hirsch, Fried or Goldman about anything in connection with this matter; and that he did not know who prepared the supposed lost letter but that he assumed it was prepared at Goldman's request since all his negotiations were with him. He then offered in evidence his own copy of a reproduction of the supposed letter, which was then introduced in evidence, but the court refused to receive it.

Defendant further testified that he had been intimately acquainted with real estate brokers for twenty years and knew "him" (Hirsch) and his usual language was in such phrases; "that he had obtained 'these papers' many times himself; that he gave his lawyer and one of the lost letters he claims to have received from Hirsch, Fried and Goldman; and that his lawyer then prepared the kind of a document that he (the lawyer) would have been to carry out that purpose."

Defendant identified three affidavits of Hirsch, Fried and Goldman in a case brought by one Hirsch, Fried and Goldman against Hirsch, Fried and Goldman, and which was then introduced to the witness stand, and which was in evidence in this case.

were filed in June, August and October, 1933, respectively, and they each aver inter alia:

"That at the time of the alleged execution of the alleged extension agreement described in plaintiff's statement of claim and as an inducement thereto, the original holders and owners of said notes *** agreed to proceed against the property securing said notes and further agreed that if the amount realized upon foreclosure of the Trust Deed securing said notes should not be sufficient to pay said notes and interest thereon in full, then, and then only, would said original holders and owners of said notes proceed against the defendants or any of them for the amount of such deficiency."

Defendant further testified that the mortgage securing these notes (including the one sued upon here) was a second mortgage; that there was a first mortgage on the property, which had been foreclosed approximately "six years ago;" and that that foreclosure wiped out the second mortgage and any foreclosure rights under same.

The only other witness who testified concerning the contents of the purported lost letter was Dorothy Lurie, defendant's former secretary. She stated that she had a definite recollection of a letter coming to the office of defendant during the month of May, 1930, "signed by Louis H. Klein, Harry W. Fried and Herbert Goldman;" that "at the time the letter came to my attention there were three names on this paper, the names as you say, of Mr. Fried, Mr. Klein and Mr. Goldman. At the time the name of Herbert Goldman was outstanding because Mr. Herbert Goldman at that time was engaged in a partnership with a brother-in-law of mine, and Mr. D. B. Klafter and I had some sort of a discussion on it because I wanted to know whether it was this same Herbert Goldman, and it was."

She further testified that she "read the document *** but I didn't clearly know just exactly what was contained in the document *** there was something contained in it in regard to an extension *** if and when such an extension was granted that Mr. D. B. Klafter would personally not be responsible or looked to for payment, or words to that effect *** I cannot remember the exact contents *** as I said before, if and when an extension was granted that Mr. Klafter would not in any way be looked to any way personally for payment or have any effect upon him personally as to the obligation."

were filed in June, August and October, 1933, respectively, and they each were later altered.

"That at the time of the alleged execution of the alleged extension agreement executed by Plaintiff's husband in June and as an instrument thereto, the original notes and owners of said notes *** agreed to proceed against the property securing said notes and further agreed that if the amount realized upon foreclosure of the trust deed securing said notes should not be sufficient to pay said notes and interest thereon in full, then, and then only, would said original holders and owners of said notes proceed against the defendants or any of them for the amount of said deficiency."

Defendant further testified that the mortgage securing these

notes (including the one then due here) was a second mortgage; that there was a first mortgage on the property, which had been foreclosed

approximately "six years ago;" and that said foreclosing agent was the second mortgage and any foreclosing rights under same.

The only other witness who testified concerning the con-

tents of the purported lost ledger was Dorothy Burke, defendant's

former secretary. She stated that she had a definite recollection

of a letter coming to the office of defendant during the month of

May, 1930, signed by Louis A. Blinn, Harry A. Fried and Robert

Goldman, and "at the time the letter came to my attention there

were three names on this paper, the names as you say, of Mr. Fried,

Mr. Blinn and Mr. Goldman. At the time the name of Robert Goldman

was outstanding because Mr. Robert Goldman at that time was engaged

in a partnership with a brother-in-law of mine, and Mr. A. Blinn

and I had some sort of a discussion on it because I wanted to know

whether or not this was Robert Goldman, and it was."

The further testified that she read the document and did

not think it likely that what was contained in the document

was something contained in it in regard to an extension

and when such an extension was granted that Mr. A. Blinn would

personally not be responsible or looked to for payment, or words to

that effect. I cannot remember the exact contents of it as I said

before, it was when an extension was granted that Mr. Blinn would

not in any way be looked to or responsible for payment of same.

Defendant himself did not testify as to the contents of the supposed lost letter and it appears conclusively from the affidavits of merits filed by him in the action on the other two notes six years prior to the trial of this cause that his then recollection of the contents of the lost letter was entirely different from what he now claims the substance of that letter was. Those affidavits set forth that the letter stated that defendant could only be proceeded against on his personal obligation on the extension agreement when the holders of the notes had exhausted their remedies against the mortgaged property. These notes were secured by a second mortgage and Klafter admits that the foreclosure of the first mortgage had wiped out all foreclosure rights under the second mortgage. The witness Dorothy Lurie could not remember the contents of the lost letter but testified that all she could remember was the effect of it - that Klafter was not to be held personally liable on the extension agreement. This testimony was given by her more than eight years after she claims to have seen the lost letter.

It is quite significant that the first two statements of defense filed by the defendant, Klafter, in this case did not refer at all to the supposed lost letter, which he now claims released him from personal liability on the extension agreement. It is also significant that the three affidavits of merits filed by him six years previously in the action in the Municipal court on the other two companion notes asserted that he was to be held to his personal obligation under the extension agreement only after the holders of the notes had exhausted their remedies against the property. It is highly improbable and almost inconceivable that the holders of the notes would insist on Klafter becoming a party to the extension agreement and assuming personal liability thereunder and that they would at the same time agree in a separate instrument to release him from his personal obligation under said agreement.

We will now consider the authenticity of the lost letter

...the proposed last letter and its apparent conclusion from the reply-
days of ... in the action on the other two letters
- six years prior to the date of this case and his own admission
tion of the contents of the last letter was completely ...
- what he now claims the substance of that letter was, those ...
... the ...

he proceeded against on his personal obligation on the ...
agreement that the holders of the notes had executed their ...
against the mortgaged property. These notes were ...
second mortgage and ... admits that the ... of the first
mortgage had wiped out all ... rights under the second ...
... the ...

of the last letter but testified that all the ...
the effect of it - that ... was not to be held personally liable
on the extension agreement. This testimony was given by her more
than eight years after the claim to have seen the last letter.
It is also significant that the first two ...

of ... filed by the defendant, ... in this case did not
refer at all to the proposed last letter, which he now claims re-
leased him from personal liability on the extension agreement. It
is also significant that the same ... of ... filed by
him six years previously in the action on the ... was on
the other two ... notes asserted that he was to be held to
his personal obligation when the extension agreement was ...
the holders of the notes had executed their ... and
property. It is highly improbable and almost impossible that
the holders of the notes would ... on ...
to the extension agreement and assuming personal liability there-
under and that they would at the same time agree in a ...
... to release him from his personal obligation under the

and whether there was any evidence as to the genuineness of the signatures claimed to have been attached thereto. Defendant himself testified that he had never seen and did not know the signatures of Klein, Fried or Goldman and that what purported to have been their signatures may have been utter forgeries. Defendant's brother, Joseph M. Klafter, testified that he did not know the signatures of Klein, Fried or Goldman, but merely saw the names Louis M. Klein, Garry Fried and Herbert Goldman on the lost letter. Dorothy Lurie testified that she had never seen and did not know the signatures of Klein, Fried or Goldman at the time she claims to have seen the lost letter. When shown their signatures on the certified photostatic copy of the extension agreement and asked if she had an opinion as to whether they were the same signatures that she had seen on the lost letter she answered that she had. She was then asked the following question and made the following answer: "Q. Would you state your opinion to be that those signatures, the three signatures, the last three on that page, are the same signatures that you saw on the document you filed? A. Well, I can't say for all three, but I know definitely that the 'G' in Mr. Goldman's name is outstanding because of a certain curley-kew that is on that 'G'. And I do, if I say so myself, have a very retentive memory and I can definitely state that that was seen by me and it will compare perfectly if there was a comparison made."

Klein, Fried and Goldman, the then holders of the notes and the parties of the first part to the extension agreement testified positively that they never signed any such document as plaintiff claims he received from them, releasing him from personal liability on the extension agreement.

Not a single witness even attempted to identify the purported signatures of Klein, Fried and Goldman on the lost letter. The most that can be said about Dorothy Lurie's testimony in this regard is that she stated that "a certain curley-kew" ^{the} in capital "G" in the Goldman signature on the extension agreement compared

and whether there was any evidence as to the signature of the sign-
atures claimed to have been obtained from the defendant himself
to the fact that he had never seen and did not know the defendant or
Klein, tried or Goldstein and that they supposed to have been their
signatures may have been those of Goldstein, defendant's brother,
Joseph A. Miller, testified that he did not know the defendant or
Klein, tried or Goldstein, but merely saw the names Louis A. Miller,
Harry tried and Herbert Goldstein on the last letter. For this purpose
testified that she had never seen and did not know the defendant or
of Klein, tried or Goldstein at the time she claimed to have seen the
last letter. When shown three signatures on the certified photo-
static copy of the extension agreement and asked if she had an
opinion as to whether they were the same signatures that she had
seen on the last letter she answered that she had, she was then
asked the following question and made the following answer: "I
would you state your opinion as to what those signatures, the three
signatures, the last three on that page, are the same signatures that
you saw on the document you signed A. Miller, I can't say for all
three, but I know definitely that the one in the middle, Goldstein's name is
outstanding because of a certain curly now that is on that one.
And I do, if I say so myself, have a very retentive memory and I can
definitely state that that was seen by me and it will compare favor-
ably if there was a comparison made."

Klein, tried and Goldstein, the then holders of the notes
and the parties of the first part to the extension agreement testi-
fied positively that they never signed any such document or documents
claims he received from them, releasing him from personal liability
on the extension agreement.

Not a single witness even attempted to identify the pur-
ported signatures of Klein, tried and Goldstein on the last letter.
The most that can be said is that the signatures in this
report is that the names of the extension agreement, the defendant,
the defendant's brother, Joseph A. Miller, tried and Goldstein, the then holders of the notes

"perfectly" with the "C" in the name Goldman on the lost letter. Surely that does not constitute evidence that Goldman's signature was on the lost document. Thus there is not a particle of evidence in the record as to the authenticity of the letter claimed to have been received by defendant and lost or as to the genuineness of the signatures thereon.

The law is well settled that both the execution and the contents of a lost instrument must be proved strictly and unequivocally. (Mariner v. Saunders, 10 Ill. 113; Owen v. Thomas, 33 id. 320; Dagley v. Black, 197 id. 53; Winter v. Dibble, 251 id. 200; Miller v. Mandel, 259 id. 314.)

As heretofore shown, the only evidence in the case as to the contents of the lost letter is the testimony of Dorothy Lurie and she did not attempt to state the substance of said letter, but merely its effect. However, even though it be assumed that her testimony as to the contents of the letter made a prima facie showing in that regard, defendant's evidence entirely failed to prove the authenticity of the letter and the genuineness of the signatures of Klein, Fried and Goldman. The execution by Klein, Fried and Goldman of the letter claimed to have been received by defendant releasing him from personal liability on the extension agreement was an essential material element of the defense and there being absolutely no evidence in the record tending to show that the then holders of the notes executed the supposed letter, defendant must be held to have failed to have established his defense. This being so the verdict of the jury was improper and the court erroneously entered judgment thereon.

Defendant claims that plaintiff, not having been a party to the extension agreement and having failed to allege and prove that he owned same or that it was assigned to him or that he had any interest therein, neither alleged nor proved a cause of action. A complete answer to this contention is found in defendant's fourth and final affidavit of defense, wherein it is expressly admitted that "plaintiff acquired the said notes and extension agreement being sued upon here-

The only evidence in this case as to the contents of the last letter is the testimony of Dorothy Smith and she did not assert or state the substance of said letter, but merely its effect. However, even though it be assumed that the letter was to the contrary of the facts stated above, it would not prove the genuineness of the letter and the genuineness of the signature of John Smith and John Smith. The question by John Smith and John Smith of the letter claim to have been received by defendant's father, who from personal knowledge of the fact that the letter was written by him, he was unable to identify it as his own and there being absolutely no witness in the record leading to show that the John Holmes of the notes enclosed the supposed letter, defendant must be held to have failed to make satisfactory defense. This being so the verdict of the jury will stand and the court accordingly entered judgment thereon.

Defendant claims that plaintiff had never been a party to the extension agreement and having failed to show that he owned same or that it was assigned to him or that he had any interest therein, neither alleged nor proved a course of action. A complete answer to this contention is found in defendant's fourth and final exhibit of defense, wherein it is expressly admitted that "plaintiff advised the all other and various persons during past years that

in with notice of Klafter's defense." Defendant cannot in this court avoid his own admission in his trial court pleading. In any event it is undisputed that plaintiff is the holder of the note upon which this action is predicated and that he instituted this suit as such holder of said note, the liability to pay same having been expressly assumed by defendant klafter under the extension agreement admittedly entered into by him.

The law is well settled that the assignment of a note carries with it not only all security relating thereto but also all rights and remedies pertaining thereto. In 28 C. J. 942 it is said:

"Where one by assignment or endorsement becomes the owner of a debt or claim, the transfer carries with it as an incident a guaranty for its payment."

In Ellsworth v. Harmon, 101 Ill. 274, the court said at p. 277:

"By the previous rulings of this court the assignment of this note carried with it the guaranty, and vested in the assignee of the note a right to sue upon the guaranty, in his own name."

In Bassett v. Perkins, 119 N. Y. D. 354, the court held at p. 359:

"A guaranty of a non-negotiable instrument - e.g., a bond and mortgage - will pass to the assignee, although such guaranty is not in terms transferred."

(To the same effect are Fogle v. Beck, 106 Ill. App. 420; Herring v. Woodhull, 29 Ill. 92; Everson v. Gere, 122 N. Y. 290; Lowery v. Fuller, 281 S. W. 968.)

In the Lowery case the court stated at p. 972:

"Further, the rule is that a contract of guaranty passes with the transfer of a note and as an incident to it, although contained in a separate agreement."

While the foregoing authorities dealt with contracts of guaranty, we see no reason why the rule enunciated therein should not apply to an extension agreement under which defendant assumed and agreed to pay the note, the time for the payment of which was extended by said agreement. Defendant's assumption in the extension

in with notice of Miller's release." Defendant moved in this court to set aside his own admission in his trial court pleading. In any event it is undisputed that liability is the holder of the note upon which this action is prosecuted and that he instituted this suit as such holder of said note, the liability to pay same having been expressly assumed by defendant Miller under an extension agreement admittedly entered into by him.

The law is well settled that the assignment of a note creates when it not only all liability relating thereto but also all rights and remedies pertaining thereto. In 22 C. 2, 242 it is said:

"Where one by assignment or endorsement becomes the owner of a debt or claim, the transfer carries with it as an incident a guaranty for its payment."

In Wassell v. Jenkins, 119 Ill. 111, 114, the court said:

"By the previous rulings of this court the assignment of this note carried with it the guaranty, and vested in the assignee of the note a right to sue upon the guaranty, in his own name."

In Wassell v. Jenkins, 119 Ill. 111, 114, the court

said as follows:

"A guaranty of a non-negotiable instrument - such as a bond and mortgage - will pass to the assignee, although such guaranty is not in terms transferred."

(To the same effect are People v. Cook, 103 Ill. 111, 114; People v. Woodruff, 29 Ill. 92; Everman v. Cook, 122 Ill. 111, 114; People v. Miller, 101 Ill. 111, 114.)

In the forever case the court stated as follows:

"Further, the rule is that a contract of guaranty passes with the transfer of a note and an incident to it, although contained in a separate agreement."

While the foregoing authorities deal with contracts of guaranty, we see no reason why the rule enunciated therein should not apply to an extension agreement under which defendant assumed and agreed to pay the note, the time for the payment of which was extended by said agreement. Defendant's assumption in the extension

agreement of the indebtedness evidenced by the notes was not special but general and continuing and is an incident to said notes.

Defendant's counsel questions the right of plaintiff to bring suit without complying with section 22 of the Civil Practice Act, Ill. State Bar Stat. 1935, chap. 110, par. 146, which requires that an assignee of a non-negotiable chose in action set forth on oath how and when he acquired title. It is a sufficient answer to this question that plaintiff is not suing as an assignee but as a holder of the note and a beneficiary under the extension agreement. (Ouska v. Pearson, 291 Ill. App. 6.)

Since there was no evidence presented by defendant that Klein, Fried and Goldman or either of them executed the letter which Klafter says he received releasing him from personal liability on the note and since proof of their execution of said letter was an essential element of his defense, we are impelled to hold that the judgment must be reversed. Having proved his case and no adequate defense having been shown, plaintiff was and is entitled to judgment notwithstanding the verdict.

We have considered the other points urged but in the view we take of this case we deem it unnecessary to discuss them.

For the reasons stated herein the order of the Municipal court of Chicago of December 23, 1938, which overruled plaintiff's motion for a judgment notwithstanding the verdict, is reversed as is the judgment entered in favor of defendant upon the verdict on the same day and judgment is entered here notwithstanding the verdict for \$7,634.40 in favor of plaintiff and against defendant.

JUDGMENT REVERSED AND JUDGMENT HERE.

Friend, P. J., and Scanlan, J., concur.

Since there was no evidence presented by defendant that Kline, Fried and Goldin or either of them executed the letter which Kline says he received regarding him from personal liability on the note and since proof of their execution of said letter was an essential element of his defense, we are inclined to hold that the judgment must be reversed. Having proved his case and no adequate defense having been shown, judgment was and is entered as judgment.

we have examined the court papers filed but in the view
we take of all this we deem it unnecessary to discuss them.
For the reasons stated herein the order of the Municipal
Court of Chicago of December 15, 1935, which overruled Plaintiff's
motion for a judgment notwithstanding the verdict, is reversed and
is the judgment entered in favor of defendant upon the verdict on
the same day and judgment is entered here notwithstanding the
verdict for \$5,000.00 in favor of Plaintiff and against defendant.

Friend, I. J., and Benjamin, J., consent.

40870

LAWRENCE FODGE and A. W. BAUMGARTNER,
doing business as ABRAHAM FODGE
COMPANY,

vs.

BOARD OF EDUCATION OF THE VILLAGE OF
OAK PARK, DISTRICT 97, a body politic
and corporate, et al.

ILLINOIS INTERIOR FINISH COMPANY,
a corporation,

Appellant,

v.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND, a corporation,
Appellee.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

309 I.A. 137¹

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This case was consolidated for hearing in this court with cases 40800 and 40962.

A number of suits were filed for the enforcement of mechanics' liens against funds due from the Board of Education of the Village of Oak Park, District 97, to the F. & M. Construction Company, the principal contractor under a contract for the erection of an addition to a school building in said Village of Oak Park, Illinois. These suits were consolidated in the trial court.

The Illinois Interior Finish Company, a party to the consolidated suit as a subcontractor which furnished labor and material under its contract, filed an amended and supplemental complaint, bringing into the suit as a defendant the Fidelity & Deposit Company of Maryland, the surety on the bond given by the principal contractor to the Board of Education in connection with the erection of the building. The defendant surety company moved to dismiss the amended and supplemental complaint. This motion was allowed. The Illinois Interior Finish Company electing to stand on its amended and supplemental complaint, said complaint was dismissed and judgment

ILLINOIS INDIAN TRADING COMPANY
INCORPORATED IN THE STATE OF ILLINOIS
CHICAGO, ILLINOIS

BEFORE ME, the undersigned authority,
on this day personally appeared
and acknowledged to me that he executed the foregoing instrument as his free act and deed.

WITNESSES my hand and the seal of my office this day of 1907.

Notary Public in and for the State of Illinois
My Commission Expires

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of my office this day of 1907.

THIS DEED WAS RECORDED FOR RECORD IN THE COUNTY OF ILLINOIS

CHICAGO AND ADJACENT

A number of units were filed for the incorporation of
to the Illinois Indian Trading Company from the Board of Directors of
the Illinois Indian Trading Company, Chicago, Illinois, on the 1st day of
January, 1907. The Illinois Indian Trading Company was organized
as an addition to a school building in said village of Oak Park,
Illinois. These units were consolidated in the trial court.
The Illinois Indian Trading Company, a party to the con-
sidered and as a partnership with the Indian Trading Company and
under its contracts, filed an amended and supplemental complaint,
bringing into the suit as a defendant the Illinois Indian Trading
Company of Oak Park, the assets on the part given by the principal
contractor to the Board of Directors in connection with the erection
of the building. The defendant, newly company moved to dismiss the
amended and supplemental complaint. This motion was allowed. The
Illinois Indian Trading Company elected to stand on the amended
and supplemental complaint, said complaint was dismissed and judgment

was entered against it for costs. This appeal followed.

The opinion in case No. 40800 is filed concurrently with this opinion. The facts alleged in the amended and supplemental complaint in this case are identical with the facts alleged in the amended cross-complaint in case No. 40800. The judgment rendered below in that case was the same as in this and the same questions were presented for review. Our decision in that case is controlling as to the questions presented here, and for the reasons there stated the judgment of the Circuit court in this cause is reversed as is the order dismissing the amended and supplemental complaint of the Illinois Interior Finishing Company on motion of defendant surety and the cause is remanded with directions that the defendant surety be required to answer said amended and supplemental complaint and that such further proceedings be had as are not inconsistent with the views herein expressed.

JUDGMENT REVERSED AND CAUSE REMANDED WITH
DIRECTIONS.

Friend, P. J., and Scanlan, J., concur.

was entered against it for costs. The opinion in this case is that the defendant's motion for summary judgment should be granted. The court found that the plaintiff failed to establish a prima facie case of negligence. The court also found that the defendant's motion for summary judgment was timely and proper. The court granted the motion for summary judgment and entered judgment for the defendant. The court also awarded costs to the defendant. The court's decision is based on the fact that the plaintiff failed to establish a prima facie case of negligence. The court found that the defendant's motion for summary judgment was timely and proper. The court granted the motion for summary judgment and entered judgment for the defendant. The court also awarded costs to the defendant.

Witness: J. J. Jones, Jr., Clerk.

40962

LAWRENCE FODGE and A. W. BAUMGARTNER,
doing business as ABALL WRECKING
COMPANY,

vs.

BOARD OF EDUCATION OF THE VILLAGE OF
OAK PARK, District 97, a body politic
and corporate, et al.

L. J. BULLIVANT, doing business as
BULLIVANT PLASTERING COMPANY,
Appellant,

vs.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND, a corporation,
Appellee.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

309 L.A. 137²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This case was consolidated for hearing in this court
with cases 40800 and 40870.

A number of suits were filed for the enforcement of
mechanics' liens against funds due from the Board of Education
of the Village of Oak Park, District 97, to the F. A. H. Con-
struction Company, the principal contractor under a contract for
the erection of an addition to a school building in said Village
of Oak Park, Illinois. These suits were consolidated in the
trial court.

L. J. Bullivant, doing business as Bullivant Plastering
Company (hereinafter for convenience referred to as Bullivant), a
party to the consolidated suit as a subcontractor who furnished
labor and material under his contract, filed an amended and supple-
mental complaint, bringing into the suit as a defendant the Fidelity
& Deposit Company of Maryland, the surety on the bond given by the
principal contractor in connection with the erection of the build-
ing. The defendant surety company moved to dismiss the amended
and supplemental complaint. This motion was allowed. Bullivant
electing to stand on his amended and supplemental complaint, said

LAURENCE TOWN and A. J. BULLIVANT
doing business as A. J. BULLIVANT
Contractors

LAURENCE TOWN and A. J. BULLIVANT
doing business as A. J. BULLIVANT
Contractors

A. J. BULLIVANT, doing business as
BULLIVANT CONTRACTORS
Applicant

TRUSTEE AND DEPOSIT COMPANY OF
ILLINOIS, a corporation,
Respondent

MR. JUSTICE GRANT delivered the opinion of the court.
This case was consolidated for hearing in this court
with cases 40800 and 40870.

A number of suits were filed for the enforcement of
mechanics' liens against Tunks and from the bond of Tunks
of the Village of Oak Park, District 97, to the U. S. Trust-
tee Company, the principal contractor under a contract for
the erection of an addition to a school building in said Village
of Oak Park, Illinois. These suits were consolidated in this
court.

A. J. Bullivant, doing business as Bullivant Contracting
Company (hereinafter for convenience referred to as Bullivant),
party to the consolidated suits as a subcontractor who furnished
labor and material under his contract, filed an amended and supple-
mental complaint, bringing into the suit as a defendant the Trust-
tee Company of Maryland, the surety on the bond given by the
principal contractor in connection with the erection of the build-
ing. The defendant surety company moved to dismiss the amended
and supplemental complaint. This motion was allowed. Bullivant
pleaded to stand on his amended and supplemental complaint, and

complaint was dismissed and judgment was entered against him for costs. This appeal followed.

The opinion in case No. 40800 is filed concurrently with this opinion. The facts alleged in the amended and supplemental complaint in this case are identical with the facts alleged in the amended cross-complaint in case No. 40800. The judgment rendered below in that case was the same as in this and the same questions were presented for review. Our decision in that case is controlling as to the questions presented here, and for the reasons there stated the judgment of the Circuit court in this cause is reversed as is the order striking the amended and supplemental complaint of L. J. Bullivant, doing business as the Bullivant Plastering Company, on motion of defendant surety and the cause is remanded with directions that the defendant surety be required to answer said amended and supplemental complaint and that such further proceedings be had as are not inconsistent with the views herein expressed.

JUDGMENT REVERSED AND CAUSE REMANDED WITH
DIRECTIONS.

Friend, P. J., and Scanlan, J., concur.

41029

CHICAGO TITLE & TRUST COMPANY,
as trustee, and DONALD MUNROE,
Plaintiffs,

v.

ANDREW D. ARMSTRONG, THOMAS
HICKS, Sr., et al.,
Defendants.

THOMAS HICKS, Sr.,
(counter-plaintiff),
Appellant,

v.

DONALD MUNROE,
(counter-defendant),
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

309 I.A. 138

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

The Chicago Title & Trust Company, trustee, and Donald Munroe, mortgagee, plaintiffs, filed a complaint against Andrew D. Armstrong and others, including Thomas Hicks, Sr., defendants, to foreclose a trust deed against the premises located at 6041 Indiana avenue, Chicago. Thomas Hicks, Sr., was served by publication. Pursuant to the decree of foreclosure the master in chancery sold the property to the mortgagee, Donald Munroe, and delivered a certificate of sale to him on October 22, 1937. On March 17, 1938, Thomas Hicks, Sr., entered his appearance and on June 23, 1938, he filed an amended counterclaim against Donald Munroe for the return of certain money he had theretofore paid Munroe. Upon the report and recommendation of the master to whom the issue raised by the amended counterclaim and the answer thereto had been referred, the court entered a decree dismissing the counterclaim for want of equity. This appeal is from that decree.

The amended counterclaim of Thomas Hicks, Sr., is as follows:

"That on or about the 22nd day of June A. D. 1929, Ivory

CHICAGO TITLE & TRUST COMPANY
as trustee, and MORTGAGE INVESTMENT
CORPORATION

CHICAGO TITLE & TRUST COMPANY
as trustee, and MORTGAGE INVESTMENT
CORPORATION

CHICAGO TITLE & TRUST COMPANY
as trustee, and MORTGAGE INVESTMENT
CORPORATION

CHICAGO TITLE & TRUST COMPANY
as trustee, and MORTGAGE INVESTMENT
CORPORATION

MR. JUSTICE SULLIVAN delivered the opinion of the court.

The Chicago Title & Trust Company, trustee, and Mortgage

Mortgage Investment Corporation, filed a complaint against Robert W.

Robert W. and others, claiming damages for breach of contract.

To foreclose a trust deed against the premises located at 1111

Indiana Avenue, Chicago. Thomas Wick, Jr., was served by pub-

lication. Pursuant to the decree of foreclosure the master in

chancery sold the property to the mortgagee, Thomas Wick, and

delivered a certificate of sale to him on October 1st, 1934.

March 17, 1935, Thomas Wick, Jr., entered his appearance and on

June 23, 1935, he filed an amended counterclaim against Thomas

Wick for the return of certain money he had theretofore paid

Wick. Upon the report and recommendation of the master in

chancery the issue raised by the amended counterclaim was referred to

the court. The court entered a decree dismissing the counter-

claim for want of equity. This appeal is from that decree.

The amended counterclaim of Thomas Wick, Jr., is as

follows:

"That on or about the 22nd day of June . . . 1934, Ivory

Hicks, Mathew Hicks and Thomas Lymore, entered into a written contract for a warranty deed with Andrew D. Armstrong and Ida Armstrong, his wife (two of the defendants in the foreclosure proceedings filed in the above entitled cause), the legal title holders of the premises sought to be foreclosed in said proceedings, for a consideration of \$13,000, one thousand dollars being paid on the execution of said contract, and the balance at the rate of \$115 per month, subject to the lien of the trust deed for \$7,500 and which lien is being foreclosed herein, and which monthly payment included interest on said mortgage of 6% and 7% on the balance of the purchase price; that said purchasers thereupon took possession of said premises under said contract and made such payments to said Andrew D. Armstrong until on or about the first day of June A. D. 1930, when said Andrew D. Armstrong and Ida Armstrong conveyed said premises, and assigned said contract, to Jackson Park National Bank (now defunct) as security for a loan of, to-wit, \$3,500, and directed said purchasers to make all payments under said contract to said bank, and pursuant thereto said purchasers did make such payments to said bank under said contract, but said bank failed to make payment of interest as it accrued on said trust deed to the legal title holder and owner thereof, and on or about the first day of June A. D. 1931, the plaintiff, Donald Munroe, notified said contract purchaser that he was the holder and owner of said trust deed and note, and to make all payment of interest accrued and to accrue to him and to no one else, and shortly thereafter said Andrew D. Armstrong notified said contract purchasers not to make any payments to said Donald Munroe but to said Jackson Park Bank.

"That on or about the first of September A. D. 1932, the Cross-claimant, Thomas Hicks, Sr., to protect the interests of said contract purchasers, interceded in said matter in their behalf, whereupon the said Donald Munroe did then and there agree with this Cross-claimant, that if he (this Counter-claimant) would make pay-

Gross-claimant, that if he (said Counter-claimant) would make pay-
whereupon the said Donald Munroe did then and there agree with this
contract purchaser, included in said notice in their behalf,
Gross-claimant, Thomas Hicks Jr., to protect the interests of said
"that on or about the first of September A. D. 1932, the
said Jackson Park Bank,
purchaser not to make any payments to said Donald Munroe but to
shortly thereafter said Andrew D. Armstrong notified said contract
of interest accrued and to accrue to him and to no one else, and
holder and owner of said trust deed and note, and to make all payments
Donald Munroe, notified said contract purchaser that he was the
of, and on or about the first day of June A. D. 1931, the plaintiff,
accrued on said trust deed to the legal title holder and owner there-
trust, but said bank failed to make payment of interest as it
said purchasers did make such payments to said bank under said con-
all payments under said contract to said bank, and pursuant thereto
for a loan of, to-wit, \$1,000, and directed said purchasers to make
said contract, to Jackson Park National Bank (now defunct) as security
D. Armstrong and his Armstrong conveyed said premises, and assigned
until on or about the first day of June A. D. 1930, when said Andrew
said contract and made such payments to said Andrew D. Armstrong
said purchasers thereupon took possession of said premises under
mortgage of 6% and 7% on the balance of the purchase price; that
closed herein, and when monthly payment including interest on said
the lien of the trust deed for \$1,000 and which lien is being fore-
contract, and the balance at the rate of \$119 per month, subject to
\$13,000, one thousand dollars being paid on the execution of said
ought to be foreclosed in said proceedings, for a consideration of
in the above entitled cause), the legal title holder of the premises
his wife (two of the defendants in the foreclosure proceedings filed
trust for a warranty deed with Andrew D. Armstrong and his Armstrong,
Hicks, Andrew Hicks and James Munroe, entered into a written con-

ments to him, as they accrued under said contract he would hold said money so paid to him in trust, pending the settlement of the dispute between the said Andrew D. Armstrong, the Jackson Park National Bank and himself over the disposition of the payments made and to be made under said contract of purchase, such payments to be applied on said contract when such matters were settled between them; otherwise he would return to this Counter-plaintiff all such payments so made to him; that thereafter this Counter-plaintiff made payments, under said verbal contract, to said Donald Munroe aggregating \$1,100, until on or about the 1st day of December A. D. 1934, a reasonable length of time having elapsed since the making of said verbal agreement between the said Donald Munroe and this Counter-plaintiff, the said Donald Munroe, not having effected a settlement of the matters in controversy between the said Andrew D. Armstrong, Jackson Park National Bank and himself, this Cross-plaintiff refused to make any further payments to said Donald Munroe (the Cross-defendant herein) and demanded the return to him of all payments so made by him, which he then and there refused so to do, and that there is now due and owing to this Cross-plaintiff from said Donald Munroe, Cross-defendant herein, the sum of, to-wit, \$1,100, together with interest thereon from the first day of December A. D. 1934 to the date hereof.

"Cross-plaintiff further represents unto your Honors that he is informed that the premises sought to be foreclosed in the foregoing proceedings have been duly sold under the decree of this Honorable Court, and that a Certificate of Sale has been duly issued by the Master in Chancery of this court to the Cross-defendant, Donald Munroe, dated the 22nd day of October A. D. 1937, and said Donald Munroe is now the holder and owner of said certificate of sale.

"Your Cross-plaintiff therefore prays that the court enter judgment in favor of this Cross-plaintiff and against the Cross-defendant, Donald Munroe, in the sum of \$1,100 with interest thereon from the said first day of December A. D. 1934, and that such judgment

writes to him, as they account for the fact that he would not
said money so paid to him in trust, pending the settlement of the
dispute between the said bank and himself, the Jackson Bank
National Bank and himself over the disposition of the payments
made and to be made under said contract of purchase, such payments
to be applied on said contract when such payments were settled between
them; otherwise he would retain no title to the said bank's share of the
payments so made to him; that the said bank's share of the payments
payments, under said verbal contract, to said bank's share of the
saying \$1,100, until on or about the 1st day of December A. D. 1934,
a reasonable length of time having elapsed since the making of said
verbal agreement between the said bank's share and the Cross-
plaintiff, the said bank's share, and having effected a settlement
of the matters in controversy between the said bank's share and the Cross-
Jackson Bank National Bank and himself, this Cross-plaintiff refused
to make any further payments to said bank's share (the Cross-
defendant herein) and demanded the return to him of all payments so
made by him, which he then and there refused so to do, and that there
is now due and owing to this Cross-plaintiff from said bank's share,
Cross-defendant herein, the sum of, to-wit, \$1,100, together with
interest thereon from the first day of December A. D. 1934 to the
date hereof.

That the Cross-plaintiff is now the holder and owner of said certificate of sale,
he is informed that the premises sought to be foreclosed in the fore-
going proceedings have been duly sold under the decree of this honor-
able Court, and that a Certificate of Sale has been duly issued by
the Master in Chancery of this court to the Cross-defendant, bank's
share, dated the 22nd day of October A. D. 1937, and said bank's
share is now the holder and owner of said certificate of sale.

"That the Cross-plaintiff is now the holder and owner of said certificate of sale,
judgment in favor of this Cross-plaintiff and against the Cross-
defendant, bank's share, in the sum of \$1,100 with interest thereon
from the said first day of December A. D. 1934, and that the

be declared a first lien on said certificate of sale so issued out of said cause to the said Donald Munroe, dated, to-wit, the 22nd day of October A. D. 1937; and for such other and further relief in the premises as may be just and equitable."

Munroe's answer to the amended counterclaim denied all the material allegations thereof and that he was in anywise indebted to the counterclaimant.

Hereinafter for convenience Thomas Hicks, Sr., the counterclaimant, will be referred to as plaintiff and Donald Munroe, the mortgagee, as defendant.

The master reported his findings and conclusion as follows:

"I find that the Counter-claimant, Thomas Hicks, Sr., has failed to sustain the allegations of his Counter-Claim.

"I find from the evidence that the Counter-Claimant, Thomas Hicks, Sr., had a substantial interest in the premises involved herein; that he resided in said premises and controlled the management and operation thereof, although title to same was to be acquired in the names of his sons and son-in-law, respectively; and that the said payments that were made by the said Thomas Hicks, Sr., were made by him voluntarily and without fraud or influence, and made for the purpose of protecting any and all interest he may have in and to said premises.

"That all of the money paid by the said Thomas Hicks, Sr., to the said Donald Munroe was paid for the purpose of reducing the Mortgage Indebtedness against said premises and in the payment of taxes and assessments levied thereon.

"That the Mortgage Indebtedness was reduced by the amount of said payments and that proper credit was given for said payments under the Decree of Foreclosure and sale entered in this cause.

"I, Therefore, find from the evidence that the equities in this cause are with the respondent, Donald Munroe; that the Counter-claimant, Thomas Hicks, Sr., has failed to sustain the material allegations of his counter-claim.

be declared a third lien on said certificate of title to issue out of said name to the said Thomas, James, Robert, Joseph, the 22nd day of October, A. D. 1937, and for each of said and further relief in the premises as may be just and equitable."

James's answer to the motion was that he was in custody of the material allegations thereof and that he was in custody of the material allegations thereof and that he was in custody of the material allegations thereof.

Hereafter for convenience Thomas, James, Robert, Joseph, the counterclaimant, will be referred to as Plaintiff and Donald James, the mortgagee, as defendant.

The master reported his findings and conclusions as follows: "I find that the counter-claimant, Thomas, James, Robert, Joseph, failed to establish the allegations of his counter-claimant."

"I find from the evidence that the counter-claimant, Thomas, James, Robert, Joseph, had a substantial interest in the premises involved herein; that he resided in said premises and controlled the management and operation thereof, although title to same was to be conveyed in the names of his sons and son-in-law, respectively; and that the said payments that were made by the said Thomas, James, Robert, Joseph, were made by him voluntarily and without fraud or influence, and made for the purpose of protecting any and all interest he may have in and to said premises."

"That all of the money paid by the said Thomas, James, Robert, Joseph, to the said Donald James was paid for the purpose of retaining the mortgage indebtedness against said premises and in the payment of taxes and assessments levied thereon."

"That the mortgage indebtedness was reduced by the amount of said payments and that proper credit was given for said payments under the terms of the mortgage and sale ordered in this cause."

"I, therefore, find from the evidence that the equities in this cause are with the respondent, Donald James; that the counter-claimant, Thomas, James, Robert, Joseph, failed to establish the material allegations of his counter-claimant."

"I, therefore, recommend that said amended Counter-Claim filed by the said Thomas Hicks, Sr., be dismissed for want of equity."

As heretofore stated the trial court approved the master's report and entered a decree dismissing the amended counterclaim for want of equity.

On June 22, 1929, Mathew Hicks, Ivory Hicks and John Lymore (sons and son-inlaw of plaintiff) entered into a written contract with Andrew D. Armstrong and his wife (the legal title holders of the premises involved) for the purchase of said premises for \$13,000. The purchasers assumed a first mortgage of \$7,500, paid \$1,000 upon the execution of the contract and agreed to pay the balance of \$4,500 at the rate of \$115 monthly, such monthly payments to include interest on the mortgage at 6%. The purchasers were also to pay all taxes and assessments levied after 1928. Plaintiff's two sons and son-in-law made the payments required by the contract for six months or a year and then because "the boys failed to apply the money and the contract was getting in the red," he began making such payments himself and continued to make them until about May, 1932, when he received a notice from defendant that there was \$177.05 interest due him as the owner of the mortgage. Inasmuch as the contract of purchase provided that \$37.50 of each monthly payment of \$115 should be applied in payment of the interest on the mortgage and since the said amount apportioned to interest was not so applied for several months, plaintiff and defendant went to the bank to which the former had made the payments on the contract and demanded that the portion of said payments that should have been paid to defendant on account of interest due on the mortgage be turned over to the latter. They were informed by the officials of the bank that Armstrong, the owner of the equity in the property, with whom plaintiff's sons and son-inlaw had entered into the contract of purchase, had theretofore made a conveyance of said property to the bank, together with an assignment of the contract of purchase, as security for a loan of \$3,500 made to him by the bank. The officials of the bank refused to pay defendant the interest then

"I, therefore, recommend that said mortgage be annulled and set aside by the said Thomas Adams, Jr., be dismissed for want of equity." As heretofore stated the trial court approved the master's report and entered a decree dismissing the amended complaint for want of equity.

On June 22, 1928, Nathan Adams, Lewis Adams and John Adams (sons and son-in-law of plaintiff) entered into a written contract with Andrew D. Armstrong and his wife (the legal title holders of the premises involved) for the purchase of said premises for \$15,000. The purchasers assumed a first mortgage of \$7,500, paid \$1,500 upon the execution of the contract and agreed to pay the balance of \$4,500 at the rate of \$115 monthly, such monthly payments to include interest on the mortgage at 6%. The purchasers were also to pay all taxes and assessments levied after 1928. Plaintiff's two sons and son-in-law made the payments required by the contract for six months or a year and then because "the boys failed to apply the money and the contract was getting in the red," he began making such payments himself and continued to make them until about May, 1932, when he received a notice from defendant that there was \$17.00 interest due him as the owner of the mortgage. Inasmuch as the contract of purchase provided that \$37.50 of each monthly payment of \$115 should be applied in payment of the interest on the mortgage and since the said amount apportioned to interest was not so applied for several months, plaintiff and defendant went to the bank to which the money was made the payments on the contract and remanded that the portion of said payments that should have been paid to defendant on account of interest due on the mortgage be turned over to the latter. They were informed by the officials of the bank that Armstrong, the owner of the equity in the property, with whom plaintiff's sons and son-in-law had entered into the contract of purchase, had heretofore made a conveyance of said property to the bank, together with an assignment of the contract of purchase, as security for a loan of \$3,500 made to him by the bank. The officials of the bank refused to pay defendant the interest then

due him and stated that no interest would be thereafter paid to him out of the monthly payments made to the bank under the contract. According to plaintiff he told defendant and the bank officials at that time that he would make no further payments on the contract until he knew where the warranty deed to the property was coming from. Neither plaintiff nor his sons or son-in-law made any further payments on the contract. Thereafter plaintiff and defendant carried on negotiations which culminated in an arrangement pursuant to which the former made a number of payments to the latter aggregating \$937, the first payment being made in October, 1932, and the last payment being made in December, 1934. All these payments were evidenced by receipts given by defendant to plaintiff. Twenty-six of such receipts contained the notation on the face thereof "to be applied on taxes," four of them the notation "held in escrow" and the receipt for the last payment of \$15 made December 26, 1934, the notation "held in escrow to be applied on next receipt given to him." The payments made by plaintiff to defendant between October, 1932, and December, 1934, averaged about \$30 a month. By his counterclaim plaintiff sought to recover from defendant the \$937 so paid.

As to the arrangement between the parties under which the foregoing payments were made plaintiff testified in substance that it was agreed that he should make such payments as he could to defendant, and, if the latter was unable to settle the differences that had arisen between himself, Armstrong and the bank over the disposition of the payments made and to be made under the contract of purchase and give plaintiff an assurance of a warranty deed and clear title to the property in eighteen months, ^{that} defendant would return said payments.

Plaintiff's granddaughter and one of his sons, who was not a party to the contract of purchase, testified that they were present in September, 1932, when the agreement was made between plaintiff and defendant. Their testimony was very indefinite and was to the effect that they had heard something said about "escrow" and "clear title in

due him and stated that no interest would be charged on the loan until the monthly payments were made to the bank under the contract. According to plaintiff he sold defendant and the bank \$100,000.00 at that time that he would make no further payments on the contract until he knew where the warranty bond for the property was coming from. Neither plaintiff nor his sons or son-in-law made any further payments on the contract. Thereafter plaintiff and defendant decided on negotiations which culminated in an arrangement pursuant to which the former made a number of payments to the latter aggregating \$337, the first payment being made in October, 1932, and the last payment being made in December, 1934. All these payments were evidenced by receipts given by defendant to plaintiff. Twenty-six of such receipts contained the notation on the face thereof "to be applied on taxes," four of them the notation "held in escrow" and the receipt for the last payment of \$19 made December 26, 1934, the notation "held in escrow" to be applied on next receipt given to him. The payments made by plaintiff to defendant between October, 1932, and December, 1934, were \$100,000.00 plus interest. It is contended that plaintiff was to recover from defendant the \$337 so paid.

As to the arrangement between the parties under which the foregoing payments were made plaintiff testified in substance that it was agreed that he should make such payments as he could to defendant, and if the latter was unable to settle the differences that had arisen between himself, plaintiff and the bank over the disposition of the payments made and to be made under the contract of purchase and give plaintiff an assignment of a certain deed and clear title to the property in question, defendant would return said payments.

Plaintiff's granddaughter and one of his sons, who was not a party to the contract of purchase, testified that they were present in September, 1932, when the agreement was made between plaintiff and defendant. Their testimony was very indefinite and was to the effect that they had heard something said about "escrow" and "clear title in

eighteen months or two years."

Defendant testified that he had no such agreement with plaintiff as the latter claims, and that the only agreement that he did have with him was that all the payments were to be applied toward taxes and assessments on the property.

Just what was plaintiff's position in relation to this property? He was not a party to the contract of purchase. His sons and son-in-law were the contract purchasers and in so far as the record discloses they made the initial payment of \$1,000 and it appears that they made the \$115 monthly payments for six months or a year. Then, because they did not or could not make any further payments under the contract, plaintiff himself made them until May, 1932, or for a period of about two years, after which date no further payments were made on the contract by anybody for the reason heretofore shown. Plaintiff testified that he made said payments to protect the interests of his sons and son-in-law in the property. Upon the execution of the contract the purchasers took possession of the property and resided therein. Plaintiff also resided in the premises up to the time the decree was entered June 21, 1939, but it does not clearly appear who collected the rents from the other occupants of said premises after plaintiff commenced to make the monthly payments under the contract. As already stated the contract purchasers assumed the mortgage and undertook to pay the interest thereon of \$37.50 monthly and also to pay the general taxes and assessments which were payable commencing with the year 1929. The defendant Munroe, who was the mortgagee, was clearly entitled to receive payment of such interest, taxes and assessments. In so far as the purchasers were concerned the only person with whom Munroe dealt was plaintiff, Thomas Hicks, Sr. What arrangement, if any, plaintiff had with his sons and son-in-law with regard to the property does not appear, but it does clearly appear that Hicks, Sr., had a substantial equitable interest in the property. Under the agreement between the parties of September, 1932, plaintiff voluntarily made payments to defendant aggregating \$937 over a period of twenty-

eighteen months or two years."

Defendant testified that he had no such agreement with

plaintiff as the latter claims, and that the only agreement that he

did have with him was that all the payments were to be applied

toward taxes and assessments on the property.

Just what was plaintiff's position in relation to this

property? He was not a party to the contract of purchase. His sons

and son-in-law were the contract purchasers and in so far as the record

discloses they made the initial payment of \$1,000 and it appears that

they made the \$117 monthly payments for six months or a year. Then,

because they did not or could not make any further payments under

the contract, plaintiff himself made them until May, 1936, or for a

period of about two years, after which date no further payments were

made on the contract by anybody for the reason heretofore shown.

Plaintiff testified that he made said payments to protect the interests

of his sons and son-in-law in the property. Upon the execution of

the contract the purchasers took possession of the property and re-

sided therein. Plaintiff also resided in the premises up to the time

the decree was entered June 21, 1936, but it does not clearly appear

who collected the rents from the other occupants of said premises

after plaintiff commenced to make the monthly payments under the con-

tract. As already stated the contract purchasers assumed the mortgage

and undertook to pay the interest thereon of \$17.50 monthly and also

to pay the general taxes and assessments which were payable commencing

with the year 1936. The defendant himself, who was the mortgagee, was

clearly entitled to receive payment of such interest, taxes and assess-

ments. In so far as the purchasers were concerned the only person with

whom money was paid was plaintiff, from whom, it will be seen,

it is, plaintiff had with his sons and son-in-law the right to the

property does not appear, but it does clearly appear that Hicks, who

had a substantial equitable interest in the property. Under the agree-

ment between the parties of September, 1936, plaintiff voluntarily

made payments to defendant aggregating \$237 over a period of twenty-

seven months.

Defendant, as mortgagee, was entitled to receive from the purchasers considerably more than that amount for interest and taxes during said period. The interest on the mortgage alone amounted to \$37.50 a month. The taxes for 1929, 1930, 1931, 1932 and 1933 amounted, respectively, to \$140.59, \$154.08, \$173.10, \$122.14 and \$102.56. There was some evidence of unpaid special assessments, but not as to the amount thereof. It was not claimed that defendant practiced any fraud or duress or extortion to procure the payments in controversy.

We think plaintiff's version of the agreement of September, 1932, is highly improbable. The mortgagee was under no obligation to straighten out the complications that had arisen because of the contract seller's loan from the bank and his conveyance of the property to said bank, together with his assignment to it of the contract of purchase and it is inconceivable that he would undertake to do so or to work the matter out to the end that in eighteen months plaintiff would be assured of a warranty deed and "clear title" to the property.

Plaintiff insists that the notation on some of the receipts "held in escrow" is conclusive that his version of the agreement with defendant is true. It is, of course, conceded that the term "escrow" was not used in its strictly legal sense and it is a fair construction of the language used that the parties merely intended that defendant would hold the individual payments until he applied them in payment of taxes and assessments. In any event the notation "held in escrow" appeared on only five of the receipts. The notation on the other twenty-six receipts was "to be applied on taxes." These latter receipts positively refute plaintiff's version of the agreement. As has been noted, the master's report found "that all of the money paid by the said Thomas Hicks, Sr., to said Donald Munroe, was paid for the purpose of reducing the Mortgage Indebtedness against said premises and in the payment of taxes and assessments levied thereon"

Defendant, as mortgagee, was entitled to receive from the
purchasers considerably more than what amount for interest and taxes
during said period. The interest on the mortgage from January 1, 1932
to January 1, 1933, was \$37.50 a month. The taxes for 1932, 1933, 1934 and 1935
amounted, respectively, to \$14.75, \$14.00, \$17.50, \$14.00 and
\$102.50. There was some evidence of unpaid special assessments, but
not as to the amount thereof. It was not claimed that defendant
prevented any fraud or breach on defendant's part in procuring the payments
in controversy.

No third plaintiff's version of the agreement of cooperation,
1932, is highly improbable. The mortgage was not an obligation to
straighten out the complications that had arisen because of the con-
tract seller's loan from the bank and his conveyance of the property
to said bank, together with his assignment to it of the contract of
purchase and it is inconceivable that he would undertake to do so or
to work the matter out to the end that in fifteen months plaintiff
would be assured of a warranty deed and "clear title" to the property.
Plaintiff insists that the notation on some of the receipts
"paid in excess" is conclusive that his version of the agreement with
defendant is true. It is, of course, conceded that the term "excess"
was not used in its strictly legal sense and it is a fair conclusion
of the language used that the parties merely intended that defendant
would hold the individual payments until he applied them in payment
of taxes and assessments. It is not shown that such a title is
appeared on only five of the receipts. The notation on the other
twenty-six receipts was "to be applied on taxes." These latter
receipts positively refute plaintiff's version of the agreement.
As has been noted, the master's report found "that all of the money
paid by the said Thomas Hicks, Jr., to said Thomas Lammie, was paid
for the purpose of obtaining the same in payment of taxes and assessments against said
property and in the payment of taxes and assessments against said property."

and "that the Mortgage Indebtedness was reduced by the amount of said payments and that proper credit was given for said payments under the Decree of Foreclosure and sale entered in this cause." The record does not include the decree of foreclosure or the evidence heard by the master in the foreclosure proceeding and it will be presumed that said decree of foreclosure contained the foregoing findings and that there was evidence presented to the master to support them.

Is plaintiff in equity and good conscience entitled to compel the return of the money which he paid defendant? While plaintiff was under no legal obligation to make the payments, as one having a substantial equitable interest in the property he did make them voluntarily to the mortgagee, who was entitled to receive them and under such circumstances equity will not compel the return of the money so paid.

Plaintiff was present when the contract of purchase was executed and appears to have been more concerned and intimately acquainted with all the dealings in relation to the property than were his sons and son-in-law. He had full knowledge of all the facts concerning the property and it is fair to assume that he made the payments to defendant to ward off foreclosure since the purchasers were in default both as to taxes and interest on the mortgage at the time the first payment was made to defendant in October, 1932, and continuously thereafter. In 48 C. J., 743, par. 280, it is said: "Except where otherwise provided by statute it is a well settled general rule that a person cannot either by way of setoff or counterclaim, or by direct action, recover back money which he has voluntarily paid with a full knowledge of all the facts, and without any fraud, duress, or extortion, although no obligation to make such payment existed. In accordance with the general rule, if a person voluntarily pays what the law will not compel him to pay, but which in equity and good conscience he ought to pay, he cannot recover it back, although the parties differ as to its application; and on the

and "that the Mortgage Indenture was voided by the payment of said payments and that proper credit was given for said payments under the Deed of Conveyance and was entered in this sense." The record does not include the Deed of Conveyance or the mortgage held by the master in the foreclosure proceeding and it will be presumed that said Deed of Conveyance contained the foregoing findings and that there was evidence presented to the master to

is plaintiff in equity and good conscience entitled to compel the return of the money which he paid defendant. While plaintiff was under no legal obligation to make the payments, one having a substantial equitable interest in the property he did make them voluntarily to the mortgagee, who was entitled to receive them and under such circumstances a bill will not compel the return of the money so paid.

Plaintiff was present when the contract of purchase was executed and agrees to have been more concerned and intimately acquainted with all the dealings in relation to the property than were his sons and son-in-law. He has full knowledge of all the facts concerning the property and it is taken to mean that he made the payments to defendant to ward off foreclosure since the business was in default both as to taxes and interest on the mortgage at the time the first payment was made to defendant in January, 1902, and continuously thereafter. In 1902, Jan. 15, it is said: "Whereas otherwise provided by statute it is well settled General rule that a person cannot recover by way of return or counterclaim, or by distraint action, recover back money which he has voluntarily paid with a full knowledge of all the facts, and without any fraud, duress, or extortion, although no obligation to make such payment existed. In accordance with the General rule, if a person voluntarily pays what the law will not compel him to pay, but which in equity and good conscience he ought to pay, he cannot recover it back, although the statute allows as to his obligation; and on the

other hand, it has been held that an action to recover money paid voluntarily will lie only where equity and good conscience require the return of the money." As has been shown plaintiff, who had a substantial equitable interest in the property, made these payments voluntarily either in his own behalf or on behalf of his sons and son-in-law with full knowledge of the facts, and, while the law would not have compelled him to make them, in equity and good conscience they should have been made and he cannot recover them back.

The law is well settled that where the master's conclusions as to the facts have been approved by the chancellor, a court of review is not justified in disturbing such findings unless they are manifestly against the weight of the evidence. In our opinion, the findings of the master are fully supported by the record and we see no reason why the decree entered thereon should be disturbed.

For the reasons stated herein the decree of the Circuit court dismissing the cross-complaint of Thomas Hicks, Sr., for want of equity is affirmed.

DECREE AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

other hand, it has been held that in order to recover money paid voluntarily with the only intent to defraud the government, the return of the money, or the loss of the property, must be shown. It is not enough to show that the money was paid voluntarily either in his own pocket or on behalf of his sons and son-in-law with full knowledge of the facts, and while the law would not have compelled him to make them, in equity and good conscience they should have been made and he cannot recover them back.

The law is well settled that where the taxpayer's conduct is such as to lead to the belief that the collection of a tax of review is not justified in withholding such amounts unless they are manifestly against the weight of the evidence. In our opinion, the findings of the master are fully supported by the record and we see no reason why the decree entered thereon should be disturbed. For the reasons stated herein the decree of the circuit court dismissing the cross-complaint of Thomas H. Smith, Jr., for want of equity is affirmed.

W. J. and George, J. J. concur.

41085

WILLIAM B. BIRD,
Appellee,

v.

FRANK O. LOWDEN, JAMES E.
GORMAN and JOSEPH B. FLEMING,
trustees of CHICAGO ROCK ISLAND
& PACIFIC RAILWAY COMPANY, a
corporation,
Appellants.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

309 I.A. 139

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiff, William B. Bird, against the trustees of the Chicago Rock Island & Pacific Railway Company under the Federal Employers' Liability Act to recover damages for personal injuries. Judgment was entered against defendants for \$4,500 upon the verdict of a jury. Defendants appeal.

Plaintiff's complaint alleged substantially that on July 1, 1938, while he was in the employ of defendants as a switchman, he was injured by an interstate passenger train, owned by defendants, at the intersection of the latter's tracks with 111th street in Chicago; and that "defendants while operating one of their north bound passenger trains which had come from out the State of Illinois and while still making part of the said journey, to-wit, the intersection of the said railroad tracks with 111th Street in the City of Chicago, County of Cook and State of Illinois, so negligently, carelessly and improperly ran, managed and operated the said passenger train so that the same then and there struck certain lamps or lantern signals which the plaintiff was then and there using to flag the said train with such force and violence that plaintiff's arm was broken and fractured, and also severely and permanently injured the plaintiff in his head, body, limbs and nervous system."

In their answer defendants denied that they "negligently or carelessly or improperly ran or managed or operated the said

WILLIAM B. BIRD,
Appellee.

FRANK O. LOWMEYER, JAMES H.
BOHLEN and JOSEPH W. FLYNN,
Trustees of CHICAGO ROCK ISLAND
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corporation,
Appellants.

MR. JUSTICE SULLIVAN delivered the opinion of the court.

This action was brought by plaintiff, William B. Bird, against the trustees of the Chicago Rock Island & Pacific Railway Company under the Federal Employers' Liability Act to recover damages for personal injuries. Judgment was entered against defendants for \$4,500 upon the verdict of a jury. Defendants

plaintiff's complaint alleged substantially that on July 1, 1932, while he was in the employ of defendants as a switchman, he was injured by an interstate passenger train, owned by defendants, at the intersection of the latter's tracks with fifth street in Chicago; and that "defendants while operating one of their north bound passenger trains which had come from out the state of Illinois and while still making part of the said journey, so-called, the intersection of the said railroad tracks with fifth street in the City of Chicago, County of Cook and State of Illinois, so negligently, carelessly and improperly ran, managed and operated the said passenger train so that the same then and there struck certain lamps or lantern signals which the plaintiff was then and there using to flag the said train with such force and violence that plaintiff's arm was broken and fractured, and also severely and permanently injured the plaintiff in his head, body, limbs and nervous system."

In their answer defendants denied that they "negligently or carelessly or improperly ran or managed or operated the said

passenger train" and that "said train struck certain lamps or lantern signals, which the plaintiff was then and there using to flag said train."

The answer then averred that "it became and was the duty of the plaintiff to flag or signal said train as it approached 111th Street in the City of Chicago and that the plaintiff, being fully aware and observing the approach of said train, turned his back to said approaching train and placed his body and arms in such close proximity to the track upon which said train was approaching that he was struck by the said train or else he struck the locomotive of said train in the act of signaling the same, and as the result thereof he was injured, and these defendants state that the plaintiff at the time was fully aware of his position near said track and of the approach of said train and that he appreciated the risks and dangers flowing from his said position in close proximity to said train and that he thereby assumed the risk of being struck and injured by said train; therefore, these defendants plead in bar of plaintiff's cause of action the defense of assumption of risk."

The salient material facts are undisputed. While other witnesses testified on the trial of this cause, we deem it necessary to consider only the testimony of plaintiff and the engineer of the passenger train involved.

Plaintiff testified that defendants' railroad tracks in Chicago in the vicinity of the accident ran north and south in a straight line from 107th street to 123th street; that he had been railroading for thirty years and during the last twelve years had been in the employ of defendants as a switchman; that on the evening of July 1, 1938, he was called to work with others about 6 p.m. to take a wrecking train to 107th street, where some cars had been derailed; that they arrived at the scene of the derailment at 7:30 p.m., and the wrecking equipment was run onto a side track immediately east of the north bound main line track; that the wrecking train consisted of a switch engine and some cars adapted for the

passenger train" and that "said train struck certain lamps or lantern signals, which the plaintiff was then and there going to flag said train."

The answer then averred that "it became and was the duty of the plaintiff to flag on signal said train as it approached Fifth Street in the city of Chicago and that the plaintiff, being fully aware and observing the approach of said train, caused his back to said approaching train and placed his body and arms in such close proximity to the track upon which said train was approaching that he was struck by the said train or else he struck the locomotive of said train in the act of signaling the same, and so the result thereof he was injured, and these defendants admit that the plaintiff at the time was fully aware of his position near said track and of the approach of said train and that he appreciated the risks and dangers flowing from his said position in close proximity to said train and that he thereby assumed the risk of being struck and injured by said train; therefore, these defendants plead in bar of plaintiff's cause of action the defense of assumption of risk."

The salient material facts are undisputed, while other witnesses testified on the trial of this cause, we deem it necessary to consider only the testimony of plaintiff and the salient of the

testimony of said plaintiff.

Plaintiff testified that he was a resident of Chicago in the vicinity of the accident ran north and south in a

straight line from 107th Street to 120th Street; that he had been residing for thirty years and during the last twenty years had been in the employ of defendants as a switchman; that on the evening of July 1, 1911, he was called to work with others about 6 p.m. to take a wrecking train to 107th Street, where some cars had been derailed; that they arrived at the scene of the derailment at 7:30 p.m., and the wrecking equipment was run onto a side track immediately east of the north bound main line track; that the wrecking train consisted of a switch engine and some cars adapted for the

particular work; that one of said cars was equipped with a beam, which, when swung around into a certain position, would foul or obstruct the main line; that his foreman instructed him to go south on the main line and stop trains approaching 107th street; that he knew that defendants' passenger train No. 8, the Rocky Mountain Limited, was about due and he proceeded south to a point about 700 or 800 feet south of 111th street, where he placed a torpedo on the east rail of track No. 3 of the main line and then placed a second torpedo about 125 feet south of the first one on the same rail; that these torpedoes were placed far enough south to insure protection in so far as the work of the wrecking crew at 107th street was concerned; that the torpedoes were so placed upon the rail that they would explode when the wheel of the locomotive ran over them and thereby warn the crew of the approaching train to reduce speed and proceed under restricted speed until further signals were received; that at the time he placed the second torpedo, he saw the lights of defendants' passenger train No. 8 coming around the curve at about 128th street, some three miles away; that he knew this train as passenger train No. 8 from Colorado and that it was on track No. 3 of the main line; that at that time he warned some pedestrians to get off the track because of the oncoming passenger train; that he then ran north between the rails of the track upon which the passenger train was traveling, swinging his red and white lanterns as a stop signal, and had reached the south side of 111th street at the time the engineer whistled for 110th street, five blocks south; that he then faced south toward the train, swinging his lanterns as a stop signal until he heard the explosion of the torpedoes as the engine ran over them; that when the locomotive struck and exploded the torpedoes it was a little over a block south of him and within his plain view; that he saw it, heard it and knew that it was coming; that he stepped from between the rails to the east side of the east rail of the north bound track on which the train was approaching; that there were no railroad tracks east of track No. 3 at 111th

particular work; that one of said cars was equipped with a horn, which, when swung around into a certain position, would tend to obstruct the main line; that this foreman instructed him to go north on the main line and stop trains approaching from the south; that he knew that defendant's passenger train No. 3, the only passenger train, was about due and he proceeded south to a point about 700 or 800 feet south of 11th street, where he placed a torpedo on the east rail of track No. 3 of the main line and then placed a second torpedo about 125 feet south of the first one on the same rail; that these torpedoes were placed far enough south to insure protection in as far as the work of the wrecking crew at 107th street was concerned; that the torpedoes were so placed upon the rail that they would explode when the wheel of the locomotive ran over them and thereby stop the crew of the approaching train to reduce speed and proceed under restricted speed until further signals were received; that at the time he placed the second torpedo, he saw the lights of defendant's passenger train No. 3 coming around the curve at about 110th street, some three miles away; that he knew this train as passenger train No. 3 from Colorado and that it was on track No. 3 of the main line; that at that time he warned some pedestrians to get off the track because of the oncoming passenger train; that he then ran north between the rails of the track upon which the passenger train was traveling, carrying his red and white lanterns as a stop signal, and had noticed the north side of 11th street at the time the engineer whistled for 11th street, signaling five blocks south; that he then stood north behind the train, carrying his lanterns as a stop signal until he heard the explosion of the torpedoes as the engine ran over them; that when the locomotive struck and exploded the torpedoes it was a little over a block south of him and within his plain view; that he saw it, heard it and knew that it was coming; that he stopped from between the rails to the east side of the east rail of the north bound track on which the train was approaching; that there were no railroad tracks east of track No. 3 at 11th

street; that he then faced north and proceeded to cross 111th street with his lanterns in his left hand, swinging them to the west and across the east rail, while the oncoming train was overtaking him; that he knew the position of the train and judged that it was coming toward him at the rate of sixty miles an hour; that he had no indication that the train would slow down or stop as he proceeded to walk north across 111th street with his back to the oncoming train, swinging his lanterns in the path of same; that there was plenty of room east of him on 111th street so that he could have stopped or stood at a point where he would have avoided contact with the engine of the train; that as he continued walking north across 111th street with his back to the approaching train, he held his lanterns out in his left hand "at arms length" across the east rail and they were struck by the front of the engine or the lanterns struck some part of same; that the next thing he knew was that he was lying in 111th street, six to eight feet east of the east rail of the north bound track; that the train did not hit him and the entire train passed him; and that as the engine passed him, the engineer was blowing "a crossing whistle."

The engineer of defendants' passenger train had forty-four years experience as a locomotive engineer. He took charge of the train at Rock Island, Illinois, at 2:20 p.m., the day of the accident. He passed 127th street at 7:50 p.m. A switch engine on the side track east of the main line and immediately in front of the wrecking outfit at 107th street had a bright head light directed south.

Defendants' engineer testified that because he was facing the headlight of the aforesaid switch engine, he did not see plaintiff near the track until his engine was within from thirty to fifty feet of him; that as he passed plaintiff the latter was on his feet along side the track; that the switch engine was inside the yard limits and that there was no rule of the railroad company requiring its headlight to be turned off at the approach of another train; that it was not

almost; that he then turned north and proceeded to cross Fifth
street with his lantern in his left hand, swinging east to the
west and around the east rail, while the oncoming train was over-
taking him; that he knew the position of the train and judged that
it was coming toward him at the rate of sixty miles an hour; that
he had no indication that the train would slow down or stop as he
proceeded to walk north across Fifth street with his back to the
oncoming train, swinging his lantern in the palm of his hand; that
there was plenty of room east of him on Fifth street so that he
could have stopped or stood at a point where he would have avoided
contact with the engine of the train; that he continued walking
north across Fifth street with his back to the approaching train,
he held his lantern out in his left hand "at arm's length" across
the east rail and they were struck by the front of the engine or
the lanterns struck some part of same; that the next thing he knew
was that he was lying in Fifth street, and to eight feet east of the
east rail of the north bound track; that the train did not hit him,
and the engine train passed him; and that as the engine passed him,
the engine was striking a wooden building.
The engine of the train, however, being the first
years experience as a locomotive engineer. He took charge of the
train at Cook Island, Illinois, at 4:30 p.m., the day of the accident.
He passed Fifth street at 7:30 p.m. A switch engine on the side track
east of the main line and immediately in front of the crossing engine
at 107th street had a bright head light directed north.
Defendants' engineer testified that because he was facing the
headlight of the approaching switch engine, he did not see plaintiff
near the track until his engine was within from thirty to fifty feet
of him; that as he passed plaintiff the latter was on his feet about
side the track; that the switch engine was inside the yard tracks and
that there was no rule of the railroad company requiring its headlight
to be turned off at the approach of another train; that it was not

customary to stop for a switch engine headlight; that as soon as the engine of the passenger train struck the torpedoes south of 112th street, he set the air brake to reduce the speed of the train; that the speed had not been reduced to any appreciable degree by the time the engine reached 111th street and passed plaintiff; that the brakes of the train remained set in a position to stop the train and had reduced the speed of the train to about five miles an hour as the engine of the train approached the vicinity of 107th street, where other employees gave him a signal to proceed; that he sounded all crossing signals; that the headlight of his engine was burning and that the stationary block signals on the line indicated that he had a clear track ahead; that the first notice he had to reduce speed was the explosion of the torpedoes; that his train was running between fifty and sixty miles an hour when his engine reached the torpedoes; that from the time his engine struck the torpedoes he had slowed his train as much as he could; and that he had his brakes fully set.

Defendants' theory as stated in their brief is that "under any view of the evidence, or under plaintiff's own testimony, defendants were guilty of no negligence proximately causing plaintiff's injury and that plaintiff assumed the risk of the injuries of which he complained. These issues were presented to the trial court by proffered peremptory instruction at the close of the evidence on behalf of the plaintiff; by peremptory instruction at the close of the evidence on behalf of all parties; by motion for judgment notwithstanding the verdict; by motion for new trial and by various instructions to the jury which were offered by the defendants and which the court refused to give."

Plaintiff's theory is as follows: "The defendants were negligent in failing to see and act upon the signals given by the plaintiff in apt time and with plenty of space between the train being operated and the stop signals for the engineer running the said train to have seen and acted upon the signals and also as part of the operation of

necessary to stop for a short engine overhaul; such as when as

the engine of the passenger train which was approaching south of
left track; he set the air pump to reduce the speed of the train;
that the speed had not been reduced to any appreciable degree by the
time the engine reached left track and passed plaintiff; that the
brakes of the train remained set in a position to stop the train and
had reduced the speed of the train to about five miles an hour as
the engine of the train approached the vicinity of left track;

where other employees gave him a signal to proceed; that he sounded
all crossing signals; that the handling of his engine was negligent
and that the stationary block signals on the line indicated that he
had a clear track ahead; that the first notice he had to reduce speed
was the explosion of the forges; that his train was running between
fifty and sixty miles an hour when his engine reached the forges;
that from the time his engine struck the forges he had slowed his
train as much as he could; and that he had his brakes fully set.

Defendants' theory as stated in their brief is that "under
any view of the evidence, or under Plaintiff's own testimony, defend-
ants were guilty of no negligence proximately causing Plaintiff's
injury and that Plaintiff assumed the risk of the injuries of which
he complained. These issues were presented to the trial court by
proffered peremptory instruction at the close of the evidence on
behalf of the plaintiff; by peremptory instruction at the close of
the evidence on behalf of all parties; by motion for judgment notwith-
standing the verdict; by motion for new trial and by various instruc-
tions to the jury which were offered by the defendants and which the
court refused to give."

Plaintiff's theory is as follows: "The defendants were negli-
gent in failing to see and act upon the signals given by the plaintiff
in apt time and with plenty of space between the train being operated
and the stop signals for the engine running the said train to have
seen and acted upon the signals and also as part of the evidence is

said train, negligence of the engineer of the train standing on the adjacent track in **not turning out his headlight in ample time** so that the engineer of the passenger train could have seen, without difficulty, the stop signals."

The doctrine of assumption of risk may be disregarded and it may be assumed that defendants were guilty of the acts of negligence with which they are charged, but still the conclusion is inescapable that plaintiff's injuries were due solely to his own independent and unnecessary act. His own carelessness was the sole proximate cause of the injuries received by him. There was an emergency that caused plaintiff to be sent to 111th street and beyond that point to flag to a stop north bound trains so that they would not continue on to the possibly obstructed tracks at 107th street, but the agents or servants of defendants certainly created no emergency at 111th street, which caused plaintiff on the spur of the moment or otherwise to project his arm, holding the signal lanterns in his hand, into the path of the oncoming train.

Ordinarily the engineer of the approaching passenger train would have seen plaintiff's lantern stop signals long before he did and would have acknowledged same with two short blasts of his locomotive whistle but on the occasion in question he did not see such signals until he was within from thirty to fifty feet of plaintiff because of the brilliant headlight on the switch engine on 107th street, which faced south and prevented him from seeing the track ahead of him or anything on said track from the time he turned north from the curve at 128th street. Whether or not this combination of circumstances constituted negligence on the part of defendants it is unnecessary to decide, since neither the failure of the engineer of the passenger train to see plaintiff's signals nor the conduct of the engineer of the switch engine in permitting his headlight to shine south toward the approaching passenger train and thereby prevent the engineer of same from seeing plaintiff's signals was the proximate cause of plaintiff's injuries or proximately contributed to cause

said train, negligence of the engineer of the train consisting on the adjacent track in not turning out his headlights in ample time so that the engineer of the passenger train could have seen, without difficulty, the stop signals.

The doctrine of assumption of risk may be distinguished and it may be assumed that defendants were guilty of the crime of negligence with which they are charged, but still the conclusion is inescapable that plaintiff's injuries were due to his own independent and unnecessary act. His own negligence was the proximate cause of the injuries received by him. There was an emergency that caused plaintiff to be sent to Fifth Street and beyond that point to flag to a stop north bound trains so that they would not continue on to the possibly obstructed tracks at Fifth Street, but the agents or servants of defendants certainly created no emergency at Fifth Street, which caused plaintiff on the spot of the moment or otherwise to project his arm, holding the signal lamp in his hand, into the path of the oncoming train.

Originally the negligence of the approaching passenger train would have been plaintiff's fault; stop signals have been in his line and would have acknowledged same with two short blasts of his locomotive whistle but on the occasion in question he did not see such signals until he was within from thirty to fifty feet of plaintiff because of the brilliant headlights on the engine of the passenger train, which forced coach and prevented him from seeing the track ahead of him or anything on said track from the time he turned corner from the curve at Fifth Street. Whether or not this combination of circumstances constituted negligence on the part of defendants it is unnecessary to decide, since neither the failure of the engineer of the passenger train to see plaintiff's signals nor the conduct of the engineer of the oncoming train in projecting his hand to show south bound the approaching passenger train and thereby prevent the engineer of same from seeing plaintiff's signals was the proximate cause of plaintiff's injuries or proximately contributed to same.

said injuries.

Regardless of the failure of the one engineer to see plaintiff's signals or of the other engineer to turn off his brilliant headlight, plaintiff was in a position of safety when he reached the south side of 111th street and stepped from between the rails of the track on which the train was traveling to the east side of said track. He saw and heard this approaching train. He knew that it was thundering toward him. Yet, instead of continuing to face the train as he flagged it and remaining in a position of safety, he turned his back to the train and walked north across the street with his extended arm projecting so far to the west in the path of some part of the engine that his lanterns were struck and he received the injuries complained of. Nothing but his own foolhardy conduct was responsible for the injuries he sustained.

It is urged that plaintiff was required by a rule of the railroad company to use his signal lanterns as he did. The rule referred to is as follows: "7-A- Employees giving signals must locate themselves so as to be plainly seen and give them in a manner to be readily understood and must use the utmost care to avoid taking the wrong signals. Unless both the conductor and engineman know that a signal given is for them, they must not move their train until advised verbally." (Italics ours.)

This is a common sense rule and there is absolutely nothing in it which required plaintiff to expose himself to danger. He could have "located" himself just a short distance further to the east away from the track, where his signals could have been just as plainly seen and his accident would have been avoided. On plaintiff's own evidence we are unable to conceive of any theory upon which he is entitled to recover.

Other points are urged but in the view we take of this case we deem it unnecessary to discuss them.

The judgment of the Superior court is reversed and judgment is entered here in favor of defendants and against plaintiff notwithstanding the verdict of the jury.

JUDGMENT REVERSED. JUDGMENT HERE IN FAVOR
OF DEFENDANTS AND AGAINST PLAINTIFF NOTWITH-
STANDING THE VERDICT.

Friend, P. J., and Scanlan, J., concur.

said injuries.

Responsibility of the engineer to the train-

first signals on of the other engine to stop off his whistle
headlight, plaintiff was in a position of safety when he reached the
south side of Fifth Street and stopped between the rails of the
track on which the train was traveling to the east side of said street.
He saw and heard this approaching train. He knew that it was traveling
toward him. Yet, instead of continuing to face the train as he
flagged it and remaining in a position of safety, he turned his back
to the train and walked north across the street with his arms outstretched
projecting so far to the west in the path of some part of the engine
that his lanterns were struck and he received the injuries complained
of. Nothing but his own foolhardy conduct was responsible for the
injuries he sustained.

It is urged that plaintiff was required by a rule of the railroad
company to use his signal lanterns as he did. The rule referred
to is as follows: "7-1- Employees driving signals must follow the

signals in the same manner as they would in the case of a signal.

signals. Unless both the conductor and engineer know that a signal
given is for them, they must not move their train until advised

otherwise. (Signal rule.)

This is a common sense rule and there is absolutely nothing in

it which requires plaintiff to expose himself to danger. He could have
"looked" himself just a short distance farther to the east away from
the track, where his signal could have been just as plainly seen and
his accident would have been avoided. On plaintiff's own evidence he
was unable to conceive of any theory upon which he is entitled to

recover.

These points are urged but in the view we take of this case

we deem it unnecessary to discuss them.
The court in the above case is reversed and judgment is
entered in favor of defendant and against plaintiff with costs.
The verdict of the jury.

THE COURT THEREUPON, ORDERED THAT THE VERDICT BE SET ASIDE
AND THAT THE CASE BE REMANDED TO THE TRIAL COURT FOR A NEW TRIAL.
IT IS SO ORDERED.

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5-1-41

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of February, in
the year of our Lord one thousand nine hundred and forty-one,
within and for the Second District of the State of Illinois:

Present -- the HON. FRED G. WOLFE, Presiding Justice

HON. BLAINE HUFFMAN, Justice

HON. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

309 I.A. 432

BE IT REMEMBERED, that afterwards, to-wit: On
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

THE UNIVERSITY OF CHICAGO

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THE UNIVERSITY OF CHICAGO

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THE UNIVERSITY OF CHICAGO

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1940

LEONARD KILLEY,)	
APPELLANT,)	
vs.)	Appeal from
)	Circuit Court of
BROWN LYNCH SCOTT COMPANY,)	Warren County,
a corporation,)	Illinois
APPELLEE.)	

HOLLEN, -- P. J.

This is a suit for damages for personal injuries sustained by the plaintiff, Leonard Killey, caused by the bursting of a metal air pressure sprayer. The defendant is a hardware dealer and handles metal pressure sprayers and kindred articles. The plaintiff desired to purchase a sprayer to spread 15 gallons of liquid aluminum paint. He had no experience or knowledge in regard to pressure sprayers and knew nothing of their method of construction. He went to the defendant, Brown Lynch Scott and Company's retail store and explained to the salesman his need for a sprayer, and asked the salesman if they had any sprayer suitable and adapted for spreading liquid aluminum paint. After some conversation between the salesman and the plaintiff, Mr. Killey purchased a sprayer from the defendant. Mr. Killey used the sprayer for applying the liquid aluminum paint, and while so doing, it blew up and injured the plaintiff.

There are four counts in the complaint. One, "based on the right of recovery upon the negligence of the defendant, arising out of its warranty; in not taking note of the defective assembly of the sprayer; and to warn the plaintiff, if he was about to put it to a use for which it was not intended, or to which it might not be used with safety to the operator, be put."

The second count is one of negligence based upon the plaintiff's right of recovery upon the misrepresentations of the agent of the defendant as to the quality, make up, and assembly of the sprayer, at the time of its purchase. The defendant well knew, or which, by the use of ordinary care, the defective condition of the sprayer should have known, and upon their representations plaintiff relied; that he, the plaintiff, was ignorant of the make up and use of such sprayers. Another count was based upon the Uniform Sales Act, the right of recovery upon a breach of the implied warranty, which arose out of reliance of the plaintiff upon the skill and judgment of the salesman for the defendant, in the selection of the sprayer purchased; that the defendant was advised at the time of its purchase, of the particular use for which the sprayer was required.

The fourth amended count is based upon the theory that the defendant, through its salesman, sold the sprayer under an oral express warranty, that it was of superior quality, fit for the purpose purchased, and upon this warranty, the plaintiff relied. It is further alleged that the sprayer failed to measure up to the warranty under which it was sold, and that by reason of the

defective construction of the sprayer in question, and while the plaintiff was using the same, the top separated from the bottom of the sprayer with great force and violence, and struck the plaintiff in the face, and the paint contained in the sprayer was thrown against the body and face of the plaintiff and he was severely injured.

The defendant filed its answer in which it admits that it sold the sprayer to plaintiff through its salesman, but denied that the same was warranted in any respect. It charges, it was sold by the defendant to the plaintiff, as a manufactured article, and at the time it was sold, the plaintiff well knew that the defendant had nothing to do with the manufacturing of the sprayer, but that it was sold under a trade name. The case was submitted to a jury and at the close of the plaintiff's case, the defendant entered a motion for a directed verdict. The Court sustained the motion and directed the jury to find the defendant not guilty, and the jury so found. The Court then dismissed the plaintiff's suit, and entered judgment against him for costs. It is from this judgment that the appeal is prosecuted.

In this case, there can be no question about the evidence. The motion to direct a verdict for the defendant raises a question of law, namely;--Whether from all the evidence in favor of the plaintiff, considered to be true, together with the reasonable inferences which may legitimately be drawn therefrom, the jury might find for the plaintiff:--Ziarlido vs. W. J. Lynch 365 Illinois, 197, 6 N. E. 2nd 125. The record shows in this case that the appellant went to the store

of the appellee and told the salesman for the appellee, that he wanted to buy a sprayer for the purpose of spreading 15 gallons of liquid aluminum paint; that the aluminum paint was liquid and very thin; that he asked the salesman of appellant if he had a sprayer that was suitable for that purpose; that the salesman asked if the paint was heavy bodied, or liquid, and the appellant told him that it was very thin, about like water which the salesman replied, "Our large sprayer will do the job." Then he took the plaintiff to another part of the store and showed him a sprayer; that the salesman stated that, "We handle the Oak Sprayer; they are a good reliable company;" that, "This sprayer has a galvanized steel tank and a screw in the top which allows a large opening so as to pour the material into it, you can get your arm down into it for cleaning." That the salesman was holding a sprayer of that kind on the counter and pointing out and stating its good qualities, namely, its brass pump with a double grip handle, and stated, "Those are the things that you want in a sprayer." There was some discussion as to the price, to which the appellant stated, that he could get a cheaper one from Sears Roebuck Company; that appellant then left the store and went up town to attend to an errand; that he came back to the store of the appellee within a short time and met the clerk behind the desk counter. The salesman carried a sprayer over and put it down on the counter and then showed two catalogues. He read from the Oak's Manufacturing Company catalogue relative to the construction of their different sprayers, saying, "that this tank was of heavy galvanized steel, pump was brass, equipped with a double grip

handle to give maximum pressure with little effort, all seams riveted and sweat soldered." Then he read the description of the Sears Roebuck sprayer and stated, "that what he, (the plaintiff,) wanted, was one where the seams were riveted and soldered, which is a much better construction;" that plaintiff told the salesman, "Apparently your sprayer is better constructed than the other." "I wouldn't know, but I need a sprayer for the paint job, so I will take one of your sprayers." The appellant was relying upon the salesman's knowledge and his statements as to the construction and suitability of the sprayer for spreading 15 gallons of aluminum paint.

Exhibit 1, of the plaintiff, is the advertising matter which was shown to the plaintiff and read by the salesman at the time the transaction was made for the purchase of the sprayer. Plaintiff stated that only the large print was read to him, and that after the advertising matter was read, which showed that the Sears Roebuck sprayer was a welded tank, the salesman indicated and stated that in contrast to the riveted and soldered seams of the defendant's sprayer, his was a much better type of construction; that this was made as a statement of the salesman and not as reading from the advertising matter; that the salesman stated several times, "That all seams are riveted and sweat soldered." There is no question but that the plaintiff purchased the sprayer and took it home, and in the course of its operation, the sprayer exploded and the plaintiff was injured.

The only question presented to this Court is, whether the Court erred in directing a verdict for the defendant, or should have submitted the case to a jury for their determination. Our

Supreme Court in the case of Mac Andrews and Forbes Company vs. Mechan, 367 on Page 288, had occasion to state the law relative to whether there was an express warranty in the sale of a machine from the defendant to the plaintiff for the purpose of extracting moisture from licorice solution, and in their opinion, they use this language: "No particular words or forms of expression are necessary to create an express warranty. A positive assertion of a matter of fact made by the seller at the time of a sale, for the purpose of assuring the buyer of the fact and inducing him to make the purchase, which assertion is relied on by the purchaser, constitutes a warranty. (VanHorn v. Stautz, 297 Ill. 530; Robinson v. Harvey, 82 id. 58; Thorne v. McVeagh, 75 id. 81; Wheeler v. Reed, 36 id. 81.) Whether there was an express warranty is to be determined from the intent of the parties as shown by expressions or words used in the contract and the meaning to be given to them. If the intent was to create a definite contract of warranty as to a certain quality of the article sold, such is an express warranty" though the contract may not have used the words "express warranty" or either of them. The intention of the parties is to be determined from the language employed, when read in the light of the context of the instrument and such surrounding circumstances as will aid the court in arriving at the true meaning of the parties."

In the case of Weiner vs. Schulte Incorporated, decided by the Supreme Court of Massachusetts reported in 176 Northeastern at Page 114, the defendant was a dealer in tobacco. The plaintiff went to the defendant and purchased some chewing tobacco. As the plaintiff was taking the, 'third chew, on his plug of tobacco,' he bit into a nail and broke a tooth, which

caused him considerable damage, for which he sued the retailer. During the course of the opinion, the Court uses this language: "It does not follow necessarily from the fact that the article purchased had a trade name that it was bought thereunder or that the buyer did not rely on the skill or judgment of the seller. The jury could have interpreted the plaintiff's testimony as meaning that though he selected a brand of tobacco he did not get it, but accepted a brand selected by the clerk. The existence of an implied warranty is not negatived where the purchaser of an article, for a definite purpose rather than of a particular kind of merchandise, relies on the seller to supply him with something adapted to that end; the latter in that case does not escape liability by the recommendation and subsequent sale of an article having a trade name."

When a written instrument contains the terms of a contract, the instrument itself must be construed by the Court as a question of law as to whether the language used therein, amounts to an implied or express warranty, if either, but where the claimed warranty is oral, or oral and partly in writing, it then becomes a question of fact for the jury to decide whether the language used amounts to a warranty. In the case of Van Horn vs. Stautz, reported in 297 Illinois, at Page 530, the defendant sold the plaintiff some hogs which later developed were diseased at the time they were sold. The plaintiff sued the defendant for damages, claiming that the hogs were warranted to be sound and free from disease. Part of the opinion of the Court is as follows: "The expression "immune hogs," as shown by the evidence, means hogs treated for cholera and does not cover any other

disease. These hogs had been vaccinated for cholera. The disease with which they were affected was mixed infection, which is a different disease from cholera.

"The charge in the declaration is that the defendant warranted that the hogs were sound; the plaintiff's evidence is that Hollis said they were all right. Neither the word "warrant" nor the word "sound" occurs in the testimony, but no particular words or forms of expression are necessary to create a warranty. A positive assertion of a matter of fact made by a seller at the time of the sale for the purpose of assuring the buyer of the fact and inducing him to make the purchase and accepted and relied on by the purchaser, constitutes a warranty. Robinson v. Harvey, 82 Ill. 58."

After reviewing and quoting from other cases, the Court continued with this language: "Decided for the defendant in error contend that the question whether what was said by Hollis to the defendant in error prior to and at the time of the sale amount to a warranty was one of law for the court to decide, and not a question of fact to be passed upon by the jury; but the cases cited decide that where the affirmations relied upon to constitute a warranty are oral, it is the province of the jury to determine from all the circumstances whether they amount to an express warranty. It was so decided in the case of Shippen v. Bowen, 122 U. S. 576, the court quoting from the opinion of the court of appeals of Maryland in Osgood v. Lewis, 2 Harr. & G. 435: "An affirmation of the quality or condition of the thing sold, not uttered as matter of opinion or belief, made by the seller at the time of sale for

the purpose of assuring the buyer of the truth of the facts affirmed and inducing him to make the purchase, ~~if~~ so received and relied on by the purchaser, is an express warranty; and in case of oral contracts, on the existence of these necessary ingredients to such a warranty it is the province of the jury to decide, upon considering all the circumstances attending the transaction." Other authorities were cited to the same effect, including *Lawless v. Perry*, *supra*. In *Robert v. Young*, 63 Ill. 363, it is said: "In cases of oral contracts it is the province of the jury to decide, in view of all the circumstances attending the transaction, whether such a warranty exists or not. * * * But when the contract is in writing it is for the court to construe and to decide whether it contains a warranty or not."

Two of the cases we have cited lack one element which is in the present one, namely, it is claimed by the defendant that the manufactured article was sold under a trade name, and therefore the defendant did not warrant in any way the article so sold, but that the purchaser bought the same at his own risk. The cases which we have cited were for the purpose of showing the law relative to whether the statements made by the appellant and appellee in the present case were questions of law for the Court to decide, or whether the same should have been submitted to the jury under proper instructions for them to decide.

In the case of *Beckett vs. J. L. Northwestern Company*, 300 Illinois, Appellate 364, 2d Edition 804, the plaintiff, Phyllis Beckett, entered the store of the defendant,

F. W. Woolworth Company, in the City of Chicago for a cup of coffee, and on her way out of the store stopped at the cosmetic counter and picked up a tube of "Pinaud's Six-Twelve Creamy Mascara" its trade name. She had some conversation with the clerk regarding the mascara. She told the clerk that she would take it with her. At that time she said to the clerk "This mascara is safe isn't it?" The clerk replied, "It is on the tube-- it says harmless," then the plaintiff replied that she would take it and she bought the tube of mascara. It later developed that as the plaintiff was using the mascara, she got some of it in her eye, and as a result thereof, she lost the sight of her eye. The suit was for damages for the breach of warranty in the sale of mascara. The defense was that the mascara was not manufactured by the defendant, but sold wholly by them under its trade name and therefore, they made no implied or expressed warranty in regard to the mascara. The plaintiff procured a judgment against the defendant for damages. The Appellate Court held that whether a conversation between the clerk of the defendant and the plaintiff relative to the merits of the mascara amounted to a warranty, was a question of fact for the jury to decide, and affirmed the judgment.

It is our conclusion that in this case, the trial court erred in directing a verdict for the defendant, but that the case should have been submitted to a jury under proper instructions for their determination. The judgment of the trial court is reversed, and the cause is remanded.

Reversed and cause remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand nine
hundred and thirty-_____

Clerk of the Appellate Court

309 S.H. 1/2
Adm. Pl. 2

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of February, in
the year of our Lord one thousand nine hundred and forty-one,
within and for the Second District of the State of Illinois:

Present -- the HON. FRED G. WOLFE, Presiding Justice

HON. BLAINE HUFFMAN, Justice

HON. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

309 I.A. 433¹

BE IT REMEMBERED, that afterwards, to-wit: On
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A.D. 1940;

DORIS BEERY,
 (Plaintiff)--Appellee,)
 vs.)
RALPH Y. BREED, Administrator of)
the Estate of Nellie M. Breed, de-)
ceased.)
 (Defendant)--Appellant.)

APPEAL FROM
CIRCUIT COURT,
HENRY COUNTY.

WOLFE, -- P. J.

This suit is an action at law, brought by Doris Beery against Ralph Y. Breed, Administrator of the Estate of Nellie M. Breed, Deceased, to recover damages alleged to have been caused by the defendant's intestate. The plaintiff was injured as a result of a head on collision between the automobile owned by Nellie M. Breed, Deceased, which was being driven by her Grandson, Robert B. Keeler, and the automobile in which the plaintiff was riding owned, and being driven by her husband, Harvey T. Beery. The accident took place on October 14, 1938, about 3:15 in the afternoon on U. S. Route 6, about five miles West of Geneseo on what is known as the Howard School House, curve. The Beery car was travelling in a northwesterly direction, and the Breed car in a southeasterly direction. In the Beery car

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This suit is an action at law, brought by Doris Henry against Ralph L. Evers, Administrator of the Estate of Nellie M. Evers, deceased, to recover damages alleged to have been caused by the defendant's intestate. The plaintiff was injured as a result of a head on collision between the automobile owned by Nellie M. Evers, deceased, which was being driven by her son, Robert E. Evers, and the automobile in which the plaintiff was riding owned and being driven by her husband, Harvey T. Henry. The accident took place on October 14, 1932, about 9:15 in the afternoon on U. S. Route 1, about three miles north of Evers as it is known as the Evers Hotel, where the Henry car was traveling in a northerly direction, and the Evers car was in a southerly direction. It was found that

were Mr. and Mrs. Beery and their son, Harvey Lee Beery. In the Breed car were Nellie M. Breed, Audrey Breed, her daughter, and Robert B. Keeler, her grandson. As a result of the collision, Doris Beery was severely injured, and Nellie M. Breed and Audrey Breed were injured and died soon after.

The original complaint filed, was against Ralph Y. Breed, Administrator of the Estate of Nellie M. Breed, Deceased, and Robert B. Keeler. Robert B. Keeler was not served with process, and is not a party to the suit. The first and second counts of plaintiff's petition allege that, the plaintiff, while in the exercise of due care and caution for her own safety, was riding in the automobile being driven by her husband, Harvey T. Beery, in a westerly direction on a public highway; that a Chrysler Sedan driven negligently by Robert B. Keeler, and owned by Nellie M. Breed, and while the said Nellie M. Breed was a passenger in said car, collided with the automobile of Harvey T. Beery, and the plaintiff was injured and sustained damages.

Count 3, after alleging the operation of the cars, charges that it thereupon became and it was the duty of the defendant, Robert B. Keeler, to exercise care in operating said Chrysler automobile along said public highway; that the defendant not regarding his duty in that behalf, then and there carelessly and negligently drove, managed and controlled said automobile, and thereby caused it to forcibly and violently run into automobile in which the plaintiff was riding, and thereby plaintiff was injured. The Count further charges that at the time and place, Robert B. Keeler drove said Chrysler automobile in an easterly direction along said public highway on the left-hand

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Count 3, after alleging the operation of the car, charges
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mobile in which the plaintiff was riding, and thereby plaintiff
was injured. The ...
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side, which was contrary to Section 54 and 55 of the Uniform Statutory Act of Regulating Traffic on highways. The count then continues, that as a direct and proximate result of said negligence of the defendant, and the collision, and impact of said automobiles, the plaintiff was greatly injured. Further in the count it charges and alleges that at the time and place aforesaid, Nellie M. Breed was the owner of, and in possession of said Chrysler Sedan automobile, and in charge of, and control of her automobile at the time and place of said collision, and further alleges that Robert B. Keeler, at the time and place of said collision, and prior thereto, was the agent and servant of Nellie M. Breed in driving and operating said Chrysler automobile, and at said time and place was driving said automobile under the control and supervision of said Nellie M. Breed, and on her business and in the course of his employment. The count concludes with an allegation of damages.

The answer of the defendant, Ralph Y. Breed, Administrator of the Estate of Nellie M. Breed, Deceased, denied all acts of negligence on the part of the defendant's intestate, and charged that the plaintiff was not in the exercise of due care and caution for her own safety at the time of the accident. The answer alleges that plaintiff's injuries were not due to any fault, or carelessness, or negligence of the plaintiff, Nellie M. Breed, Deceased, but was due to the carelessness, improper conduct and omissions of Harvey T. Beery, the husband of the plaintiff, the driver of the automobile in which the plaintiff was riding. To this answer, the plaintiff filed a reply denying that plaintiff's injuries were caused by any act of negligence, or omission of Harvey T. Beery.

also, which was contrary to Section 15 and 16 of the Traffic
Statute, and of regulating traffic on highways. The
then contended, that as a direct and proximate result of the
negligence of the defendant, and his violation, and failure to
said defendant, the plaintiff was directly injured. That in
the course of changes and changes that at the time and place
aforesaid, while it was in the hands of, and in possession
of said Chrysler Motor Automobile, was in charge of, and was
of her automobile at the time and place of said collision, and
further alleged that Robert A. Brown, at the time and place of
said collision, and prior thereto, was the agent and servant of
Helvie M. Brown in driving, and operating said Chrysler auto-
mobile, and at said time and place was driving said automobile
under the control and supervision of said Helvie M. Brown, and
on her business and in the course of his employment. The
court concluded with an allegation of damages.

The answer of the defendant, Helen L. Brown, administratrix
of the Estate of Helvie M. Brown, Brown, denied the facts of
negligence on the part of the defendant's intestate, and averred
that the plaintiff was not in the exercise of due care and caution
for her own safety at the time of the collision. The answer
alleges that plaintiff's injuries were due to her fault,
on contributory, or negligence of the plaintiff, the Helen L. Brown,
Brown, and was due to the negligence, improper conduct and
omissions of Henry E. Brown, the husband of the plaintiff, and
driver of the automobile in which the plaintiff was riding. In
this answer, the defendant filed a copy of the following
injuries sustained by the plaintiff, and of the damages

At the close of the plaintiff's evidence, a motion was made by the defendant for a directed verdict. The ruling on this motion was reserved. The defendant did not offer any evidence, and the case was submitted to a jury who found the issues in favor of the plaintiff, and assessed her damages at \$5,200.00. The defendant entered a motion for judgment notwithstanding the verdict, which motion the Court denied. The defendant then made a motion for a new trial, and this motion was also denied. The defendant then made a motion in arrest of judgment, and this also was denied. A judgment was entered on the verdict for \$5,330.00, and it is from this judgment that the appeal is prosecuted.

It is insisted by the appellant that the Court erred in not granting the defendant's motion for a judgment notwithstanding the verdict, and also in overruling their motion for a new trial. It is his contention that there is not sufficient evidence in the case to sustain a verdict in favor of the plaintiff. The record clearly discloses that the collision in question, occurred on the north side of the black line of a hard-surfaced road in what would be commonly called the west lane of traffic. The road does not run due east and west, but rather in a northwesterly and a southeasterly direction; that the plaintiff, was riding with her husband and small son, in an automobile being driven in a westerly direction in their proper lane of traffic; that the collision occurred in the north lane of traffic, where under ordinary circumstances the defendant's car should not have been driven.

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Mr. A. B. Harrison, a witness called on behalf of the plaintiff, testified that the Beery car was westbound, and the other car eastbound; that the Beery car had run off onto the dirt at least half way, or a little more than one-half off of the pavement onto the dirt; that the other car was at an angle, and to the left of a person going east on the north side of the road; that a car in which a man, was at the wheel, and two women in the car, was standing with the front of the car over the left side of the slab. Another witness, Harry Johnson, in describing how he found the cars when he first arrived at the scene of the accident, stated, that the right wheels of the Oldsmobile were off on the shoulder. It was headed west. The Chrysler was about one-half way over the black line headed east. The cars were right up against each other. The Chrysler was mashed up in front, and the left fender of the Oldsmobile was mashed, and the front wheel was off. A Highway Maintenance man, Perry M. Skinner, stated, that when he first saw the cars, they were both north of the black line. The Chrysler was pointed northwest and the Oldsmobile northwest; that there was plenty of room on the slab for cars to pass going east and west. William O'Hara, a farmer living near the scene of the accident, stated, that he got there before the cars were moved; that both cars were completely over the black line on the north side of the pavement; that the right wheels of the Oldsmobile were about a foot on the north shoulder; that the Oldsmobile was pointed northwest and the Chrysler northeast. George Erdman, who lived about 20 rods from the scene of the collision, ran down to the place where the accident occurred, and stated when he got there, both cars were on the north side of the black line.

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... the corner side of the black line.

Harvey Lee Beery, the small son of the plaintiff, after describing where he was riding in his "daddy's" car, in answer to the questions testified as follows: "Q. What was the first thing you noticed? A. A car coming up over the hill. Q. Which way, from the east or west? A. From the west. Q. Then what did you notice? Did you notice your father there as he drove along? A. Yes. Q. What did he do? A. He turned the wheel. Q. Which way? A. To the right. Q. Where? A. Off the road. Q. Where did he go off the road? A. Onto the grass. Q. Did you see or hear anything then? A. Yes. Q. What happened? A. I never saw anything, but I heard a car coming and ran right into us. Q. What did you hear? A. A big crash." All of this evidence is wholly uncontradicted, and it seems to us the jury was justified in believing it and rendering a verdict in favor of the plaintiff.

It is also insisted that there is no evidence that the plaintiff was in the exercise of due care and caution for her own safety. In this, we think the appellant is in error. The position of the cars after the collision shows, that the impact took place on the north side of the pavement, or in plaintiff's proper lane of traffic, and that the defendant's car was being driven in the wrong lane of traffic. Harvey T. Beery's testimony, which is uncontradicted, is also to the effect that prior to the collision, he had seen the car coming over the hill west of where the collision occurred, and between the time he saw the car approaching and the time of the collision, his father turned the car to the right, off of the road onto the grass. It seems to us this is clear and convincing proof that just before, and at the time of the collision, the plaintiff was in the exercise of due care and caution for her own safety.

It is also contended by the appellant, that plaintiff's instructions No. 3, 4 and 5 given by the Court, were erroneous and should not have been given, and were prejudicial to the defendant's case. We have considered appellant's criticism of these instructions, but we find no merit in their contention that they unduly emphasize the duties and obligations of defendant's intestate and the driver of her car, and make no reference to the duties and obligations of the plaintiff and the driver of the car in which she was riding.

An examination of the other instruction clearly shows that the jurors were properly instructed relative to the duty of the plaintiff in the exercise of care and caution for her own safety. The instruction taken as a whole, fairly presented the law applicable to the case.

The judgment of the Trial Court is affirmed.

Affirmed.

It is also contended by the defendant that the instructions 1, 2, 3, 4 and 5 given to the jury, were erroneous and should not have been given, and that prejudicial to the defendant's case. We have considered the defendant's criticism of these instructions, but we find no error in their substance. That they merely expressed the duties and obligations of defendant's associate and the driver of the car, and relate to the force to be used and obligation of the plaintiff and the driver of the car in which the victim was riding.

In consideration of the other instruction given, it is clear that the jurors were properly instructed relative to the duty of the plaintiff in the exercise of care and caution for her own safety. The instruction taken as a whole, fairly presented the law applicable to the case.

The judgment of the trial court is affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand nine
hundred and thirty-_____

Clerk of the Appellate Court

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Alexander Lumber Company, a Corporation, Plaintiff
and Appellant, v. L. W. Swindlehurst, Harrison B.
Noble, Clifford Woodrum and C. A. Van Horn
Defendants and Appellees.

General No. 9247.

309 I.A. 433²

MR. PRESIDING JUSTICE FULTON delivered the opinion
of the Court.

The Alexander Lumber Company, the Appellant, filed a complaint in the Circuit Court of McLean County, seeking to foreclose a mechanic's lien for materials furnished through its yards at Heyworth, Illinois, to one L. W. Swindlehurst, lessee of John Locke Noble the owner of real estate upon which Swindlehurst constructed a gravel bin. By the terms of the lease Swindlehurst agreed to erect on the leased premises a gravel plant for the purpose of screening, grading, washing and preparing gravel and sand for sale.

John Locke Noble was the owner of an 80 acre tract of land described as the "East one-half ($\frac{1}{2}$) of the Southeast quarter ($\frac{1}{4}$) of Section 28, Township 22 North, Range 2, East of the Third P. M. in McLean County, Illinois."

Noble died in the year 1932, and his son, Harrison B. Noble, the Appellee on this appeal, became the owner of the said premises, and is the real party in interest defending the suit. Swindlehurst agreed by the lease to pay as rental ten cents per cubic yard for all gravel and sand removed from the property during each preceding month. He became insolvent, was adjudicated a bankrupt and hence the suit by Appellant to collect the bill for materials.

The lease was executed in September 1931, by John Locke Noble although the negotiations were largely carried on by the Appellee as the agent of his father. Harrison B. Noble was living on the above described premises as tenant of his father, who lived across the road.

In the lease the premises were described as "a certain tract of land known as the John L. Noble gravel pit" located about one mile north of Heyworth, Illinois, and more particularly described as follows:

Beginning at a point next to the Railroad

Woodrum had purchased at the execution sale of February 19, 1934. Woodrum secured judgment in the replevin suit and shortly thereafter dismantled and removed the bin in question. Appellee testified that on several occasions during the pendency of these actions he gave personal notice to the Appellant or its agents concerning these proceedings but the Appellant was not made a party to any of those cases.

When Appellant filed its complaint in March, 1934, it alleged that the defendants Clifford Woodrum or C. A. Van Horn or both of them were about to take some steps to tear down and destroy the improvement constructed upon the premises out of materials furnished by the Appellant, and prayed for an injunction restraining said defendants from dismantling or destroying such building. The bin was actually removed from the premises by Woodrum in July, 1934.

After the complaint was answered, the cause was referred to the Master in Chancery who made a report recommending a lien for the sum of \$714.62, with interest from January 27, 1932. On a hearing in the Circuit Court exceptions to the Master's Report were sustained and the complaint dismissed for want of equity. It is from that decree that this appeal is taken.

In its decree the Circuit Court found that Swindlehurst was not the lessee of the eighty acre tract heretofore described but was in fact the lessee of the portion of said real estate particularly described in the lease by metes and bounds; that the erection of a gravel bin upon the premises sought to be foreclosed did not constitute a permanent building or improvement upon the premises but was temporary in character and constituted a trade fixture which was subject to be changed from time to time as the operation of the gravel bin might require, and that it was not in fact an addition to the real estate, did not enhance its value, but was personal property removable by the tenant.

The main questions raised by the record in the case are

1. Did the improvement in controversy constitute a permanent improvement or merely a trade fixture?
2. Was Appellant estopped from asserting its claim for lien because of intervening circumstances?
3. Was the claim for lien fatally defective in not differentiating between lienable and non lienable items?
4. Did the claim for lien fail to comply with the statutory requirements in the description of the real estate?

A careful reading of the testimony convinces this court quite conclusively that the improvement made by Swindlehurst as tenant in this case was permanent in character and constituted a building within the meaning of Section One of the Mechanics Lien Act. The manner of construction was entirely foreign to that of a trade fixture. The building consisted of a heavy concrete foundation extending from two to three feet underground. The bin or superstructure was attached to the concrete foundation by means of uprights consisting of 8 x 8 timbers fastened to the foundation with bolts set in the concrete. The building was 30 feet high, 12 to 15 feet wide and about 60 feet long, with provisions at the top for the support of machinery which hoisted and screened the gravel. Near the bin a switch track was located and installed at a very substantial expense. Competent witnesses testified to the permanency of such construction and it is apparent from the very nature of the building itself that it is more than a trade fixture and could not be moved and changed from time to time as the operation of the gravel bin might require.

The improvement is firmly attached to the realty and a permanent fixture.

Both John Locke Noble and the Appellee, Harrison B. Noble, were present at frequent intervals during the construction of the building and directed the location of the gravel bin and the position of the fences. The evidence is convincing that they authorized and knowingly permitted their lessee to make the improvement, and they cannot now be heard to say that the improvement was undesirable or unprofitable when there were no restrictions as to the extent of such improvement. *Fehr Construction Co. v. Postl System*, 288 Ill. 634. *Haas Electric Co. v. Amusement Co.*, 236 Ill. 452.

It is next insisted that Appellant is estopped from asserting its claim for lien because of its conduct after the foreclosure proceedings were instituted in March, 1934. The facts show the following series of events. The lease to Swindlehurst was executed in September, 1931. The tenant immediately entered upon possession and during the following winter and spring constructed the gravel bin. The last material was furnished by Appellant in June, 1932. The lien was filed August 25, 1932, and the foreclosure was filed in March, 1934. In December, 1933, Woodrum sued Swindlehurst for wages and recovered a judgment. Execution was issued and levy made upon the gravel

bin in question. Sale was made by a constable on February 19, 1934, and the bin was torn down and dismantled after sale. In July, 1934, Woodrum sued out a writ of replevin against Appellee and recovered judgment for possession during that month. All of these proceedings were carried out in a court of the Justice of the Peace. In the complaint filed for foreclosure of the lien the Appellant asked for an injunction restraining Woodrum and others from destroying and tearing down the gravel plant. It is the position of Appellee that Appellant is now estopped from asserting its lien because more diligence was not shown in securing an injunction as prayed for in the complaint. Appellee relies upon the doctrine laid down in *Loughran v. Gorman*, 256 Ill. 46, and other cases wherein the Court holds that if a person interested in an estate knowingly misleads another into dealing with the estate as though he were not interested, he will be postponed to the rights of the party so misled. Also that it is the duty of a person having a right to assert it when he sees another about to commit an act infringing upon it; and acquiescence consisting of mere silence may operate as an estoppel in equity to preclude a party from asserting legal title or rights in property.

The situation in the present case does not fit that principle of law. The Appellant filed its claim for lien very promptly after the delivery of the last materials. Whether it had any knowledge or not of the proceedings for judgment in the Justice Court, it chose the proper forum for having its rights adjudicated when it filed a complaint to foreclose its lien in the Circuit Court of McLean County. It made all parties interested in the subject matter defendants in the suit. It was not made a party to any of the suits or proceedings had in the Justice Court. Under these circumstances it cannot be said that the Appellant stood idly by and because of silence misled any other person **as to what its claim was against the property.** Neither did they remain silent as to their rights, because filing the foreclosure suit setting up the interests of the parties was the most positive assertion of their claim that could be lawfully made.

We do not believe that Appellant was in any manner estopped from asserting or prosecuting its claim because of the facts related in this record.

The question of whether the claim for lien is defective because it does not distinguish between lienable

and non lienable items, is not clearly presented by the record. In the objections filed by Appellee to the report of the Master in Chancery there was no mention made of this point and no finding on such question in his report. The decree of the Court is silent as to any controversy of that character. The Appellee now says that a boiler house was built upon the premises without foundation and movable.

The original contract for materials amounted to \$1,261.60, upon which the sum of \$400.00 in cash was paid and some materials returned. Swindlehurst testified that all the materials purchased from Appellant were used in constructing the gravel bin and none used in any other place. There is no testimony introduced in opposition to that evidence. We do not deem this point a serious obstacle to recovery by Appellant.

Finally the Appellee urges that the claim for lien was invalid because of the incorrect description of the premises and this perhaps presents the most serious problem in the case.

The description in the claim for lien covers a much larger tract than the portion covered by the lease or by the subsequent oral agreement. In *Springer v. Kroeschell*, 161 Ill. 358, the Court said, "A description is sufficient, if there is enough in it to enable a party familiar with the locality to identify the premises intended to be described, with reasonable certainty". In the case of *Sorg v. Pfalzgraf*, 113 Ill. App. 569, the Court said, "The fact that a lien is claimed upon more land than is subject thereto does not defeat the lien, if it does not injure or mislead any one, and if it is not done fraudulently". This language was adopted and approved in the case of *Granquist v. Western Tube Co.* 144 Ill. App. 230.

The Appellee in this case was entirely familiar with the tract described in the claim for lien as well as the portion used by Swindlehurst in making and operating the improvement. As no third party was interested the Appellee could not be misled and there is no showing that the inclusion of the larger tract in the claim was done fraudulently. We do not believe the description of more land than was subject to the lien in the claim filed should be cause for defeating the lien on the portion of the land which should be subjected to such lien.

It is the opinion of this Court that the decree of the Circuit Court was erroneous and should be reversed and remanded for the purpose of ascertaining by com-

petent proof just what portion of the real estate described in the claim for lien should be made subject to the lien; that in all other respects the decree should overrule and deny the exceptions to the Master's report, direct the payment to the Appellant of the amount found due, together with interest and costs as found in the said Master's report; that in default of such payment the premises found subject to the lien, or so much thereof as may be sufficient to realize the sum so due under the decree may be sold under the orders and direction of the Circuit Court of McLean County.

*Decree Reversed and Remanded in part
with directions.*

**Mack Henry, Plaintiff-Appellee, v. East and West
Insurance Company, of New Haven, Connecticut,
a corporation, Defendant-Appellant**

General No. 9249.

309 I.A. 434

Mr. PRESIDING JUSTICE FULTON delivered the opinion
of the Court.

Mack Henry, Plaintiff-Appellee, brought this action at law against East and West Insurance Company, Defendant-Appellant, seeking to recover under a fire insurance policy for a loss he claims to have sustained to household and personal effects in a building located at Topeka, Illinois. His amended declaration set forth his former residence; that on January 15, 1932, he procured a fire insurance policy from Appellant in the amount of \$1,500.00 covering his household goods and personal effects; that the fair cash value of said property on February 18, 1932 was \$1,334.70 and on that date it was totally destroyed by fire; that he applied to agent of Appellant for adjustment and for blanks on which to make proofs of loss; that such agent refused to furnish him such blanks and denied liability on the part of Appellant.

Appellant filed a general issue and a large number of special pleas setting forth policy provisions and violations thereof by Appellee. Replications were filed to all such pleas.

The proofs show that in December, 1931, the Appellee was a resident of Marcelline, Missouri. On January 1st, 1932, he rented a house in the Village of Topeka, Illinois, and moved three truck loads of furniture and household goods to his new residence. On January 15th, 1932, he procured an insurance policy from James M. Gregory of Havana, Illinois, a soliciting agent for the Appellant Insurance Company. On February 18, 1932, the building, which he had rented from one Rilea, was destroyed by fire. The house consisted of six rooms and a basement. On the afternoon before the fire the Appellee testified that he went to Havana by train and stayed over night. The fire was first seen by neighbors about two o'clock A. M. and Appellee stated he did not learn of the fire until he returned from Havana the same morning. He further

testified that within a day or two he notified James M. Gregory of the fire and Gregory immediately visited the premises and told Appellee the adjuster would be along in a few days and look after his claim; that Appellee went to Havana a few days thereafter to see Gregory and was arrested and placed in jail where he was confined for about ten days; that after he got out of jail he again went to Gregory and asked for the proper blanks to make out his proof of loss; that Gregory refused to furnish any blanks and told him the Company did not owe him anything and denied liability. Two witnesses for Appellee, Lyle Barrett and Homer Medlin, corroborated this conversation. As to the facts concerning the moving the three truck loads of furniture and the general character of the household goods moved, the Appellee was corroborated by witnesses Homer Medlin, Carl Barrett and Dale Lane. The Appellee testified to the value of the different items of household goods destroyed by the fire, which he said amounted to about \$1,334.00.

For the Appellant Charles H. Long, in the small loan and financing business, who had never seen the furniture or household goods, testified as to the value of each article, aggregating not to exceed the sum of \$164.50. James M. Gregory testified as to the issuance of the policy for \$1,500.00, the notification to him by the Appellee of the loss, but denied having the conversation with Appellee in the presence of Medlin and Barrett. He further stated that he notified Appellee that he had no power or authority to adjust losses or to either deny or affirm liability on the part of Appellant. Other witnesses testified as to having been in the Appellee's house on one or two occasions and that they had never seen many of the articles which the Appellee claimed to have owned and lost in the fire. None of these witnesses claimed to have made any inspection of all the rooms in the house occupied by Appellee and had made only casual observation of the contents. Others testified that the shades were drawn or pulled down in the house both day and night. There was other negative testimony concerning observations of witnesses as to what could be seen in the debris and ashes after the fire.

The case was tried before a jury in the Circuit Court of Adams County resulting in a verdict for the Appellee in the sum of \$1,250.00. Later the Court overruled motion of Appellant for judgment notwithstanding the verdict, or in the alternative for a new trial,

or in the alternative in arrest of judgment, and upon Appellee consenting to a remittitur in the sum of \$221.65, entered judgment in favor of Appellee for \$1,028.35 and costs. Appellant is appealing from that judgment.

The Appellant very earnestly insists that the Appellee ought not to recover, because the proofs show evidence of incendiarism; fail to show by competent evidence the amount of the alleged loss and damage; show evidence of fraud and false swearing on the part of Appellee; and that Appellee failed to comply with the requirement of the policy that the insured within 60 days after a loss give to the insurer a sworn proof of loss, any one of which would be sufficient to void the policy. While we recognize there is an abundance of law covering each of the points raised by the Appellant and that he has presented the same in a scholarly and lawyerlike manner, we feel that the problems in the case are largely questions of fact which have been submitted to a jury. The story of the fire leaves open a large field for the imagination and perhaps some of the conduct of the Appellee could be made the basis for suspicion, but there is no clear proof of incendiarism, nor positive evidence of fraud or false swearing. The evidence of Appellee as to values and the amount of the alleged loss are somewhat indefinite but sufficient to sustain a verdict and judgment. There was sufficient testimony in the record to sustain a finding by the jury that the condition of the policy requiring sworn proofs of loss to be furnished to insurer within 60 days was waived.

This case was originally started in February, 1933, as a bill in equity. A reference was had to a Master in Chancery who took the proofs and found in favor of the Appellee, fixing the value of the property destroyed at \$747.55. That finding and report of the Master was approved and affirmed by the Circuit Court and decree entered. Upon appeal to this Court the cause was reversed and remanded because we did not believe the case showed any basis for equitable relief and that Appellee had an adequate remedy at law. The Circuit Court of Adams County then transferred the case to the law calendar and the issues were tried before a jury, and verdict returned. Motions were heard before a competent trial judge who required a remittitur and then entered judgment. We do not find any substantial error in the Rulings of that

Court on the admissibility of evidence nor in the giving or refusal of instructions to the jury.

With this history of the case before us, and the finding both in the equity case, and the trial before a jury in favor of Appellee, we are reluctant to disturb the judgment of the trial Court on this record and the same is therefore affirmed.

Affirmed.

abstract

Wm. Vollbracht and Roy W. Vollbracht, doing business as Wm. Vollbracht Company, Plaintiffs and Appellants, v. William Renken, Albert Renken, Henry Renken, Anna Renken and Maggie Renken, doing business as Renken Bros., Defendants and Appellees.

General No. 9256.

309 I.A. 435¹

Mr. PRESIDING JUSTICE FULTON delivered the opinion of the Court.

This is a suit by William Vollbracht and Roy W. Vollbracht, doing business as Wm. Vollbracht Company, Plaintiffs-Appellants, against the Renken brothers and sisters, doing business as Renken Bros. Defendants-Appellees, for damages resulting from an alleged breach of certain warranties in connection with the sale of corn on April 19, 1936.

The complaint alleged and the proof on the part of Appellants showed that on the 18th day of April, 1936, William Vollbracht drove out to the Renken farm and looked over a crib of corn; that the next morning both Appellants, who were father and son engaged in the seed business at Camp Point, Illinois, went back to the Renken farm and bought 1067 bushels of corn at \$1.25 per bushel. Appellants both testify that before the sale was made they had a conversation with Albert Renken, one of the Appellees, at which Wilke Renken another Appellee was present; that Albert Renken stated that the crib contained good seed corn grown in the year 1933, and that it would test 90% or better; that they had tested it and it tested 95%; that Appellants paid for the corn and after delivery it was tipped, sorted and shelled; that they offered the shelled corn at \$3.00 a bushel and the cob corn for \$2.50 a bushel; that they sold the corn as having been grown in 1933 and having a germination of 90-95%; that when complaints came in from customers about the Renken corn, they quit selling it and made a refund to most of the customers and sold the balance as ordinary feed corn at whatever price they could secure averaging about fifty cents a bushel; that they later learned the corn was grown in 1932. Also that they made no germination test of the Renken corn before selling same.

The proof of the Appellees showed that they did not guarantee and represent the corn to be seed corn, but told Appellants that the corn was grown in 1932; that Appellants purchased it at their own risk and that they did not have anything to do with the seed corn business; that Appellant William Vollbracht said that the corn looked good to him, that he had had forty years experience; that the corn was laying loose in the bin and was inspected by Appellants; that Wilke Renken told the Vollbrachts that his brother took a test of the corn and it tested 70% and that Mr. Huey and Mr. Lohr had taken a test which tested between 50 and 60%.

Proof was made that the corn was not good seed corn and that the price of ordinary corn during the month of April, 1936, was from 60 to 70 cents a bushel.

On a trial in the Circuit Court of Adams County the jury found the issues for the Appellees, upon which verdict judgment was entered against the Appellants for costs, and the appeal is from that judgment.

Appellants contend that the verdict is manifestly against the weight of the evidence, but the evidence above related formed a clear issue of fact as to whether the Appellees made the representations and warranties in connection with the sale of the corn as claimed by Appellants. The evidence was conflicting and on the main issue confined to the testimony of the parties themselves. This was a question which was peculiarly within the province of the jury to decide, and having so decided, it would be manifestly unfair for a Court to disturb their verdict. *Wright v. Stinger*, 269 Ill. App. 224.

Further complaint is made because the trial Court refused to give certain instructions to the jury offered in behalf of Appellants. Instruction No. 23 offered by Appellants and refused reads as follows:

"The Court instructs the Jury that the measure of damages in this case is the difference between the contract price and what the corn was actually worth in the market at the place and at the time when the corn was actually delivered by the defendants to the plaintiffs."

This instruction may contain a substantially correct rule of law but it does not preface the rule by any statement of the facts upon which the rule is based and might lead the jury to believe the court was of the opinion that the Appellants were entitled to damages.

We believe the instruction in its present form was properly refused.

Instruction No. 24, also refused, related to the credibility of witnesses and its contents are substantially set forth in three similar given instructions, being Nos. 6 and 8 on the part of Appellants and No. 11 on the part of Appellees. The question of the credibility was fully covered by given instructions.

Instruction No. 25 on the matter of preponderance of evidence includes also credibility and the statement at the close of the instruction announcing that

"the number of credible and disinterested witnesses on the one side or the other of a disputed point is a proper element for the jury to consider in determining where lies the preponderance of the evidence"

is included verbatim in instruction No. 8 given in behalf of Appellants. The omission of the first clause of said instruction

"The jury are instructed that the preponderance of evidence in a case is not, necessarily, alone determined by the number of witnesses testifying to a particular fact or state of facts"

in the light of other instructions given on preponderance of evidence, could not be considered harmful.

Another instruction which Appellant contends was improperly refused was No. 26, as follows:

"You are instructed that the weight of the testimony does not necessarily depend on the greater number of witnesses sworn on either side of a question in dispute, but you are at liberty, as jurors, to consider all the facts and circumstances appearing from the evidence in the case, and determining from that which of the witnesses are worthy of the greater credit; and if you believe, from the evidence that the evidence of a small number of witnesses on one side is more credible and trustworthy than the evidence of the greater number on the other side, then the evidence preponderates on the side of the smaller number of witnesses."

This same instruction was given and approved in the case of *The St. Louis and O'Fallon Railway Company v. The Union Trust and Savings Bank*, 209 Ill. 457, but has received considerable attention in later cases. In commenting on such an instruction our courts have criticized the same and similar language because it tends to minimize the influence of the number of witnesses and is not balanced by a further statement that the number of credible witnesses is a proper element to be considered by the jury. *City of Chicago*

v. *Van Schaack Bros. Chemical Works*, 330 Ill. 264. *Rudin v. Wheelock*, 249 Ill. App. 249. *Noone v. Olehy*, 297 Ill. 160. We do not consider that the Court erred in refusing this instruction.

Instruction No. 27 might well have been given by the Court but its various elements have been expressed in one form or another in other given instructions so that the refusal of same was not substantial error.

The refusal of instruction No. 28 was correct. The statement in an instruction relating to the question of the burden of proof

“that if the jury find that the evidence bearing upon plaintiffs’ case preponderates in their favor, although but slightly, it will be sufficient for the jury to find the issues in their favor”

has many times been condemned by our courts. *Molloy v. Chicago Rapid Transit Co.*, 335 Ill. 164.

We do not deem it serious error that the Appellants’ instructions Nos. 29 and 30 were refused. Where there were some inconsequential errors in the instructions, they are not sufficient to demand a reversal of a judgment based upon the verdict of a jury. *Down v. Comstock*, 318 Ill. 445.

Even if slight errors may have intervened it is apparent from the record that both sides of the case were given a fair and impartial trial, and the judgment of the Court entered upon the verdict of the jury is affirmed.

Affirmed.

People of the State of Illinois, Defendant in Error, v.
John Player, Impleaded, etc., Plaintiff in Error.

General No. 9257.

309 I.A. 435²

MR. JUSTICE RISS delivered the opinion of the Court.

The defendants, John Player and Robert Player, were tried and found guilty by a jury in the Circuit Court of Sangamon County under an indictment consisting of three counts wherein they were charged with violation of the provisions of Section 13 of the Retailers' Occupation Tax Act (Ill. Rev. Stat., 1939, Chap. 120, par. 452) by wilfully and unlawfully failing to make returns to the State Department of Finance of all tangible property sold by them for the respective months of April, May and June, 1939. Motions to set aside the verdict and in arrest of judgment were filed and denied, and judgments of conviction were entered on the verdict. A fine in the sum of \$1000 and for costs was assessed against the defendant John Player, and he was sentenced to serve a term of ninety days in the County jail. Robert Player, fined \$200.00, does not join in the writ of error sued out by John Player. Separate verdicts and judgments were not returned and entered as to each count.

It is contended that the evidence fails to establish the guilt of the defendant beyond a reasonable doubt; that the Court erred in refusing to give to the jury defendants' refused Instruction No. 1, and that it was error to sentence the defendant to a fine and imprisonment in gross, instead of fixing a sentence on each of the counts of the indictment.

John Player and his brother, Robert Player, have operated a dairy business in Warrensville, Illinois, for the past twelve years. They sell dairy products at retail, and a part of their business is classified as wholesale.

Two investigators for the Retailers' Occupation Tax Division of the Finance Department of Illinois testified that on August 14, 1939, in the course of their duties, they purchased drinks at the defendant's place of business; that the defendant told them that he had never filed any returns and that he did not intend to file any.

A number of citizens of Warrensville testified to having made purchases of dairy products at the defendant's place of business during the months of April, May and June, 1939. In fact, the defendant admits that he filed no returns for these months with the Department of Finance and gave as his reason that he had a case pending at Wheaton, Illinois, involving the amount of tax which he owed the State. He also testified that he felt that the Tax Act was unfair, discriminatory and unconstitutional and that his rights were being infringed upon; also that he felt that the filing of the returns might jeopardize his position in the civil suit pending against him and that he had no intention of defrauding the State out of any sales tax that may be due to it. On cross examination he said that he had never paid any sales tax, but that he had paid a judgment rendered for tax. The defendant admitted that he had filed no returns as required by the Act, hence the only question to be determined was whether or not he had wilfully failed to file the returns.

This was purely a question for the jury. The defendant knew, or should have known, that the constitutionality of the Retailers' Occupation Tax had been sustained in many cases. He had persistently refused to pay the tax and refused to make returns of the sales of tangible personal property, as required by the Retailers' Occupation Tax Act. The defendant testified fully as to his reasons for not filing returns as required by law. He also offered proof of his good character and reputation. The jury failed to accept this explanation for not complying with the provisions of the Act. From the evidence, the jury was fully justified in finding that such failure was wilful. It became a question of fact for them to determine. His intention was to be gathered from his actions and conduct appearing in evidence and not alone from his stated intention.

Complaint was made of the Court's action in refusing defendant's Instruction No. 1, in which the jury was told that the word "wilful", as used in the indictment means more than intentional and that it means "A determination with a bad intent to omit filing the reports in question". This Instruction does not correctly state the law. The correct statement of the law was given in other instructions.

The jury was fully instructed. They were told by another instruction that even if the defendants were mistaken in their interpretation of the law, yet if you find that they honestly believed that they were not



subject to the Retailers' Occupation Tax, nor under a duty to file the reports in question, then the failure, if any, to file said reports was not wilful, and the defendants should be found not guilty. There was no error in refusing defendant's Instruction No. 1.

It is further contended by the defendant that the Court erred by assessing against him a gross fine of \$1000 and to serve a sentence of ninety days in jail, for the reason that each of the counts of the indictment charged a separate offense, and insists that a separate penalty should have been imposed on each of the counts of the indictment. No assignment of error nor contention was made that the punishment is excessive.

The penalty assessed could have been properly assessed under either of the counts of the indictment. The State may join misdemeanors of the same character in the same indictment, and the Court may fix separate punishment upon each count on which there is a conviction. This practice has always been approved by the Courts of Review of this State. *People v. Elliot*, 272 Ill. 592, 112 N. E. 300.

While it would be proper to remand this case with instructions to the lower Court to impose a separate sentence on each count of the indictment, the plaintiff in error has not specifically asked that the cause be remanded to the Circuit Court for resentencing. Therefore, we see no reason why this Court should not affirm the judgment under the authority of *People v. Rettich*, 332 Ill. 49, 163 N. E. 367.

This Court has carefully examined all of the plaintiff in error's assignments of error and finds no prejudicial error therein. The judgment of the Trial Court is therefore affirmed.

Judgment Affirmed.



People of the State of Illinois ex rel Juanita Green,
Petitioner-Appellee, v. Edna Hapenny,
Defendant-Appellant.

General No. 9269.

MR. JUSTICE RIESS delivered the opinion of the Court.

A habeas corpus proceeding had been instituted in the Circuit Court of Tazewell County by the People ex rel Juanita Green, appellee herein, on June 6, 1940, seeking to obtain the release and custody of relator's three year old twin male children, Robert and Gerald Green, from the alleged illegal restraint of defendant appellant, Edna Hapenny, probation officer of said county. A decree had previously been entered by the County Court of said County on September 5, 1938, declaring said children, then aged one year last past, to be dependent children and awarding custody and guardianship of their persons to said probation officer.

Relator Juanita Green alleged that at the time of the dependency proceedings in the County Court, she was a minor, aged seventeen years, was not served with summons nor other notice, but entered her appearance in writing and that the decree was void for want of jurisdiction of her person. The Circuit Court, upon such verified petition and return, together with record of the County Court in the dependency proceeding and hearing of oral testimony of relator as to her age, over defendant's objections, held the decree of the County Court to be void for want of jurisdiction of the person of the relator, who was found to be a minor at the time the decree was entered; that said children were unlawfully held in custody and control of the defendant and ordered that they be restored to the custody of the petitioning mother. Appeal herein then followed.

Appellant assigned error in overruling defendant's objection to oral testimony showing relator to have been a minor when she signed her entry of appearance and waiver of summons in the County Court and in denying defendant's motion to strike said oral testimony.

There was no dispute as to the facts in this case. Defendant appellant's sole contention is that the de-

cree of the County Court could only be directly attacked and could not be attacked collaterally in a habeas corpus proceeding on jurisdictional grounds unless such grounds or lack of jurisdiction affirmatively appeared upon an examination of the record and that no evidence, *de hors* the record, could be admitted in support of such collateral attack.

The petitioning relator contends, *e contra*, that an infant defendant is incompetent to waive service of process or confer jurisdiction of the Court by voluntary written appearance and that such collateral fact of infancy establishing want of jurisdiction could be shown by evidence *de hors* the record.

The decree of the County Court sought to be collaterally attacked recites that "it appearing to the Court that Robert Green and Juanita Green, parents of said children, defendants in said cause, have entered their appearance in writing, waiving issuance of summons and consenting to a hearing before the Court, and that all parties at interest are now before the Court. The Court finds that it has jurisdiction of all the parties to this cause and the subject matter hereof." Following the above jurisdictional recitals and findings, the decree contains the usual recitals and findings based upon and conforming to the requirements and provisions of the dependency act (Chapter 23, par. 196, *et. seq.*, Ill. Rev. Statutes, 1939), and decrees the children to be dependent within the purview of the Act and further finds that "all of the allegations as set forth in the petition are duly proven to be true as therein alleged." It further recites that "the Court hereby retains jurisdiction of this cause for the purpose of making such further or other orders herein for the welfare of said children as may from time to time be found to their best interests and in accordance with the Statute in such cases made and provided."

From the affirmative recitals of the decree or from the whole of the record, nothing appears to indicate that the Court lacked either jurisdiction of the parties or the subject matter of the cause, but the contrary is recited therein. The findings of the Court were sought to be collaterally attacked by the oral testimony of the petitioning mother *de hors* the record to the effect that she was aged seventeen years when the entry of appearance and waiver of process was filed by her, to the admission of which objection was interposed by appellant in the habeas corpus hearing and should have been sustained by the Court.



In a collateral attack seeking to show lack of jurisdiction of the parties in the Court, where such jurisdiction is expressly found and decreed by the Court, the lack of jurisdiction must appear from the face of the record and cannot be shown by testimony de hors the record. *Harris v. Lester*, 80 Ill. 307, 314; *Waterbury Nat. Bank v. Reed*, 231 Ill. 246, 250; 83 N. E. 188; *Smith v. Herdlicka*, 323 Ill. 585, 591; 154 N. E. 414.

An attack upon a decree by habeas corpus is a collateral attack. *People v. Montgomery*, 365 Ill. 478, 6 N. E. (2d) 868; *People v. Fahey*, et al., 230 Ill. App. 143.

The record and the jurisdiction recitals of the County Court, which, for the purpose of the hearing herein, affirmatively show jurisdiction of the parties and subject matter, purport a verity and could be neither collaterally attacked nor reviewed by a proceeding at law under the habeas corpus act. Whether or not the record could be attacked in a chancery proceeding in the nature of a bill for review or by a hearing in the Court under applicable provisions of the statute, as in the recent case of *In re Tilton*, 286 Ill. App. 388, 3 N. E. (2d) 716, are not matters before this Court, and any comments in relation thereto would be mere obiter dicta.

The judgment of the Circuit Court of Tazewell County is reversed and the cause remanded with directions to dismiss the petition and remand the children to the custody of the probation officer.

Reversed and remanded with directions.

FILED

MAR 1 1941

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

David J. Mallett
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

October Term, A. D. 1940.

Term No. 4001

Agenda No. 8.

CHARLES KLEHM,

Plaintiff-Appellee,

v.

EDWARD TRIPPLE,

Defendant-Appellant.

Appeal from the

Circuit Court of

St. Clair County

STONE, P. J.

309 I.A. 436²

This appeal from the Circuit Court of St. Clair County is to reverse a judgment of \$52.00 in favor of plaintiff as the result of an accounting between the parties had under the direction of the Court.

Back in 1933 the parties entered into a contract to engage together in the growing of peonies on the share, plaintiff to furnish the plants, defendant to furnish the land and do the work. Business apparently went on amicably for some years and in 1935 a new contract was entered into which embodied substantially the features of the old contract. In 1939 the defendant claimed the right to rescind this contract and adopt another course of conduct than that which the parties apparently had understood the contract to prescribe. This plaintiff objected to and the result was this lawsuit.

At the trial the court denied the right in defendant to rescind the contract. In this we think under all the circumstances and a rational and reasonable interpretation of the contract, the court was correct in its ruling. It

then became a question of accounting between the parties. This was done under the direction of the court and we may say a careful accounting was made on a subject which was highly technical. Defendant insists that he was denied his rights by reason of the admission of testimony which the court admitted erroneously. Even granting that fact for the sake of argument, which we do not admit, we are still of the opinion that the court had enough competent evidence before it to justify its decision of the question before it. The court heard the witnesses and saw them as they testified, made allowance for credits and debits and in all things conducted an accounting in which he found that the defendant was indebted to plaintiff in the sum of \$52.00. Judgment was rendered for that amount.

There was no question of law involved here that would justify us in reversing this cause. We therefore conclude that the finding and judgment of the trial court was correct. It is hereby affirmed.

Judgment Affirmed.

FILED

MAR 1 1941

David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

October Term, A. D. 1940.

Abstract

Term No. 31

Agenda No. 5

KATHERINE SCHAFER,
Plaintiff-Appellee

v.

CITY OF EDWARDSVILLE,
ILLINOIS, A Municipal
Corporation,

Defendant-Appellant.

Appeal from the
Circuit Court of
Madison County

309 I.A. 437'

STONE, P. J.

On the morning of April 30, 1939, appellee was injured by falling on a sidewalk at 500 North Main Street in Edwardsville, Illinois. The fall was occasioned by tripping over a small pipe protruding from a concrete slab. This pipe was about three inches high and about the same in diameter. It was about one inch west of the sidewalk on which appellee was walking. At the time of her injury she was walking on a sidewalk which was in good order; the sun was shining; the weather was clear, and the sidewalk was dry. The plug which is shown in appellant's exhibits is a part of a gas pipe connecting with the gas taken underneath the ground and was capped by the company at the time the pump was removed. The sidewalk there is five feet wide. Appellee with her sister and Mrs. Hosto were walking abreast along this sidewalk going north and when they reached the point at or near where the gas pipe is they met a woman coming south on the sidewalk. Appellee stepped off the sidewalk onto the block of concrete and the other two women stopped and stepped back to let the other woman pass. After this other woman passed by, appellee started to walk back on the sidewalk and as

she did she tripped or stubbed her toe on this gas plug and fell towards and onto the sidewalk. Her hand was injured. Afterwards infection set in and she was treated by a doctor in Edwardsville and later by a doctor in St. Louis.

She brought suit against the City of Edwardsville for damages for her injuries growing out of the incident of the fall. The complaint was in one count. Before bringing her suit she complied with the Statute in reference to giving notice to the city attorney and the city clerk, and started the suit within the six months period, and so forth; but in her complaint she did not allege that she had given the notice as prescribed by the Statute. Evidence in proof of the giving of such notice was offered at the trial, objected to by appellant, but permitted to go to the jury over the objection, by the court. A verdict was rendered in favor of plaintiff for the sum of \$1500.00

Appellant filed a motion in arrest of judgment on April 30, 1940, raising the same ground, -- that is, that the notice prescribed by the Statute was not alleged in the complaint. On the 6th of May Appellee moved to amend her complaint to allege the statutory notice. Appellant on May the 13th filed its motion to strike appellee's motion for leave to amend. On the same day the court entered an order allowing Appellee's motion to amend complaint and recited in said order that the amendment is filed. Appellant's motion to strike was argued and taken under advisement. On June 28th the court denied appellant's motion to strike and entered judgment on the verdict. It is called to the attention of this court that the motion for leave to amend was not actually filed until June 29th, the day after the judgment.

It appears from the record, however, that all parties, --the court and counsel for either side, regarded it as filed, and that appellant had copies of the notice and motion to amend, and acting upon that they filed their motion to strike

said amendment. Inasmuch as all parties interested treated the Motion as filed on the 13th day of May, the actual physical filing on the 29th of June we do not regard as of serious consequence.

This record does not show a failure of a cause of action, but does show a cause of action defectively stated. So that there was nothing new by way of amendment to the cause of action; it was already in existence; everything had been done that needed to be done in regard to the notice, save the allegation in the complaint that such notice was given. Under our practice and rules of court the trial court in our judgment was entirely within the law in allowing this amendment and inasmuch as an amendment of this character goes back to the date of the filing of the complaint, the record now shows that the objection to the admissibility of testimony was properly overruled and that the motion in arrest of judgment was properly denied.

On July 5th of the same year appellant filed its motion for a new trial and this motion being denied and judgment being entered this appeal is prosecuted. In its appeal appellant assigns as error that the court refused to direct a verdict in favor of appellant, in the admission of evidence (referring again to the court's ruling in admitting proof of notice without the allegation), and in giving improper instructions to the jury; also that the court erred in denying the motion in arrest of judgment, entering judgment, and granting plaintiff leave to amend her complaint.

It is urged by appellant that the defendant was not guilty of actionable negligence in the premises and that appellee was guilty of contributory negligence. These questions with a condition of facts almost identical with the facts in the case at bar were before our Supreme Court in *Brennan vs City of Streator*, 256 Ill. 468. In that case the injured woman was walking on a perfectly good brick sidewalk

when she came upon three women ahead of her taking up the full width thereof. She stepped from the sidewalk in order to pass them, at its outer edge. As she started to do so her foot struck a valve box attached to a water service pipe which projected four to five inches above the ground within from one to three inches of the edge of the sidewalk. She was thrown to the ground and injured. The valve box over which she stumbled was an iron pipe three and a half inches in diameter coming up from the water service pipe, extending above the surface and terminating in a cap five inches in diameter. In commenting upon the conditions just described, our Supreme Court said, "Such obstructions do not constitute a violation of the duty of the city toward the public if the street still remains reasonably safe for those using it in vehicles or on foot and exercising ordinary care. But the question arises in each case whether the obstruction is of such a character that the passenger using the street or the sidewalk in the ordinary way and using ordinary care for his own safety is exposed to an unnecessary and unreasonable risk. This is usually a question of fact, but it may become a question of law where the obstruction is of such a character that reasonable minds cannot differ about it. The present is not such a case. It cannot be said, as a matter of law, to show a want of ordinary care for a person desiring to pass a party of walkers taking up the whole walk to step on the sod a few inches to one side of the brick or stone or concrete sidewalk. It is not an unusual thing, and what is not unusual is to be anticipated. It is negligence for one whose duty is to use reasonable care to make conditions safe, to provide conditions which are unsafe under circumstances which ought to be anticipated. At least it was a question of fact which was proper for submission to the jury whether the valve-box, constructed

and located as it was with reference to the sidewalk, was so dangerous a menace to persons using the sidewalk with ordinary care as showed a want of ordinary care for their safety on the part of the city in permitting it to remain there."

Further on in the opinion the court said, "It was a question of fact for the jury whether the plaintiff stepping off the sidewalk for a moment to pass persons in front of her, was passing on and over the sidewalk in the usual way, though at the instant of her stumbling and falling she may not have been actually upon the sidewalk."

This case, in our judgment, answers both contentions; that is to say, both questions were questions of fact properly submitted to the jury.

The evidence in this case shows that the pipe over which appellee tripped had been there for some three to four months, in which time the city could have and in the exercise of reasonable care in that behalf, would have had notice of its presence.

The next assignment of error is that the trial court erred in giving certain instructions on behalf of appellee. This assignment is well taken.

The second instruction in the series tells the jury that the City of Edwardsville was charged with the duty of exercising ordinary care in keeping its sidewalks reasonably safe for persons using said sidewalks who are themselves using ordinary care. This instruction does not touch this case at any point. If this were a suit growing out of a defective sidewalk it would be different, but it is not; this is a suit for damages on account of the negligence charged in the complaint. The evidence shows that the sidewalk was in perfectly good condition. This instruction ought not to have been given. However, as said by our Supreme Court in another case, while this instruction is useless it is also harmless.

The next instruction directs a verdict for the plaintiff without any regard to whether the defendant was guilty of negligence. It recites certain facts in proof and tells the jury that if they believe those facts and that the plaintiff was in the exercise of ordinary care they may find the defendant guilty. It leaves out the question of whether or not those facts constitute negligence. It virtually tells the jury as a matter of law that they do constitute negligence and thereby takes from the jury its free will agency to determine whether those facts if proven constitute negligence. This instruction might just as well have said "These facts constitute negligence per se." One of the necessary facts for the jury to find was whether the facts as detailed constituted negligence as charged. This duty the court relieved them of and left them no choice on that subject. This instruction is not cured by any other instruction in the series. Indeed it could not have been cured. "An instruction which directs a verdict for the plaintiff if he had proved the facts alleged in his declaration cannot be cured by other instructions." *Illinois Terra Cotta Lumber Co. v. Hanley*, 214 Ill. 243; *Illinois Central R. R. Co. vs Smith* 208 Ill. 608; *Krieger v. Aurora, Elgin & Chicago R. R. Co.* 242 Ill. 544. The giving of this instruction constitutes reversible error.

It was not error to refuse the two refused instructions offered on behalf of defendant. These instructions might be proper if this were a sidewalk case; -- that is to say, a case for a defective sidewalk, but they take from the jury the right to determine whether the city was negligent in these premises, and as said above in the quotation from *Brennan v. City of Streator*, supra, this was a question of fact for the jury.

For the errors enumerated, this cause is reversed and remanded to the Circuit Court of Madison County for a new trial.

REVERSED AND REMANDED.



Abstract

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

October Term, A.D. 1940.

Term No. 40027

Agenda No. 27

EUGENE J. AMBUEHL, a minor,)
by JACOB AMBUEHL, his)
Father and Next Friend,)
Plaintiff-Appellee)
v.)
CLETUS STEINER,)
Defendant-Appellant.)

Appeal from the
Circuit Court of
Madison County,
Illinois.

FILED

MAR 1 1941

David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

CULBERTSON, J.

This is an appeal from a Fifteen Hundred (\$1500.00)

Dollar Judgment rendered in favor of Eugene J. Ambuehl, a minor, who brings suit by Jacob Ambuehl, his father and next friend, Appellee, (hereinafter called plaintiff) and against Appellant, Cletus Steiner, (hereinafter called defendant).

Eugene J. Ambuehl, a twenty year old minor, brought an action at law, by his father and next friend, against Cletus Steiner, a minor of the same age, to recover damages for injuries to his person resulting from an automobile collision that occurred on a country road northeast of Highland, Illinois on the evening of April 22nd, 1939. The plaintiff charged the defendant with negligence in failing to swerve his automobile so as to avoid colliding with the automobile of the plaintiff, in swerving his automobile from the north to the south side of the highway into and against plaintiff's car, in failing to keep and drive his automobile upon the right or northerly side of the highway and otherwise so driving and operating his automobile that it came into violent collision with plaintiff's car.

The evidence in this case disclosed that the accident occurred upon an oil surfaced country road at about 7:40 o'clock on the evening of April 22, 1939. The oiled portion of the road was about nine feet in width and there was not sufficient room for two automobiles to pass on the oiled strip. The road ran in

a general east and west direction. There were dirt shoulders about five feet wide on each side of the oiled surface, each of which extended to ditches of approximately a foot and a half in depth. The road was level and at the time in question, the weather was clear and the road surface dry.

Plaintiff testified: that he left home in his father's automobile, alone, about 7:40 P.M.: that he drove north on his drive to the highway, made a left turn and drove west on the highway; that it was dark and he had his lights on; that when he reached the Landolt home, about one-quarter mile west of his home, he discovered he had forgotten his hat; ; that he backed into the Landolt drive, made a left turn, and then drove back east on said highway toward his home to get his hat; that as he drove east his automobile was about a foot south of the center of the highway, with his two left wheels on the oiled portion and his two right wheels on the south shoulder of the highway, and that at no time, prior to the collision, was any portion of his automobile north of the center of the highway; that after he turned east out of the Landolt drive he saw the lights of defendant's automobile between an eighth and a quarter of a mile east; that he maintained his position on the south side of the highway, and that when the automobiles were 10 or 12 feet apart, he noticed defendant pulling into his automobile; that the left front of defendant's car struck the left front of his car, and that both cars stopped immediately; that he got out of his car, but was hurt and did not notice the position of the cars after the collision.

Plaintiff further testified on cross examination that the cars jammed together and neither moved after the collision; that the collision put the lights out; that it was dark and that he was rather groggy after the collision and couldn't make out much about the position of the cars.

Jacob Ambuehl, father of plaintiff testified: that when plaintiff left his home in the automobile his lights were burning; that he reached the scene shortly after the collision; that plaintiff's car was standing straight east and west on the

south side of the road, with defendant's car swerved into it facing southwest; that plaintiff's car was on the south side of the center of the road, and defendant's car was diagonally across the north side, facing southwest; that the fronts of the cars were locked together and that no lights were burning; that he then left and went to the hospital; then came back to the scene with his son-in-law and looked again; that neither car had been moved during his absence; that with his flashlight he followed the tracks of defendant's car that night, and again early the next morning; that when he reached the scene next morning plaintiff's car had been removed, but that defendant's car was still there, standing just as it did the evening before; that the tracks that led up to defendant's car wheels turned to the south, swerved in, and faced southwest.

On cross-examination this witness testified that night he walked around the two cars, that he had a flashlight; that the tracks he saw extended east about 30 feet on the north side of the road; that these tracks continued straight until within 10 or 12 feet of plaintiff's car, when they went in, turned in, four or five feet to the south; when he came back from the hospital he also used his flashlight; that the right rear wheel of defendant's car was off on the north shoulder of the road; the front end was toward the southwest; that the whole north half of the road was occupied by defendant's car; that plaintiff's car was four or five feet from the ditch, with its left wheels on the oiled portion, and that he went back to the scene at 6 o'clock the next morning; that the front end of plaintiff's car was battered in; that the two cars had been jammed together; that he was there when the wrecker pulled plaintiff's car away; and that cars in passing could pass plaintiff's car on the south by driving with two wheels in the ditch on the south side.

The medical testimony in this case discloses that plaintiff's upper central incisors were fractured and that one was repaired with a three-fourths crown with a dowel and in the other a large gold inlay was used. There was also read in

of the cars collided. The defendant immediately got out of his car and noticed the position of the two automobiles on the road. His machine was standing with the front end turned a little to the south, at a slight angle. He could tell the center of the oiled strip and said that his left front wheel was a few inches, about three or four, north of the center of the oiled portion of the road, his left rear wheel about a foot and a half north of the center, and the right rear wheel was off on the dirt shoulder on the north side of the road. He testified that he observed the position of the Ambuehl Chevrolet on the highway, and that it was right down the center of the road, with half of it on the north side and half on the south side of the oiled portion.

The defendant further testified that when he met plaintiff, immediately after the collision, the plaintiff said, "If you know what is good for you, you will say we both had our lights burning." This statement was denied by the Plaintiff.

The witness Ed Landolt testified that the Ambuehl Chevrolet was standing straight east and west about three feet over the center of the road to the south, with its two left wheels north of the center and that the Steiner car was heading west with its right rear wheel on the edge of the oil and the left front wheel about eighteen inches over the center.

Elmer Landolt, another witness called by the defendant, testified that he heard the crash and went to the scene of the accident. He looked at both cars during the hour and a half or longer that he was there. According to him the Ambuehl car was headed east and all four of its wheels were on the oiled part of the road and it was farther to the south than the Steiner car, which was more on the north side of the road. He also said that the right rear wheel of the Steiner car was a little bit off of the oiled strip.

Alvin Landolt, a witness called by the defendant, testified that he heard the collision, went to the scene and observed the position of the cars. The right rear wheel of defendant's Ford was a little bit off of the oiled portion, on the dirt shoulder on the north side of the road.

Elmer Koch, a witness called by the defendant, testified

that he was a mechanic living in Highland, in answer to a call to get the Ambuehl car, arrived at the scene of the accident with his wrecker between 10 and 11 o'clock that night and that the front ends of the two cars were jammed together. He approached from the west, drove up to the back of the Ambuehl Chevrolet, pulled it back from the other car and then drove around and lifted the front end to pull it away. He stated that the Ambuehl car was on the oiled part of the road, "nabe a little to the right of the road -- south side of the road -- very close to the center, in my estimation."

Adolph Wagner, a witness called by the defendant, testified that he reached the scene about twenty minutes after the accident occurred. He took his flashlight and examined the two cars, which he found jammed together. The Steiner Ford was standing a little off the oiled road, on the north side. Its right wheel was about sixteen inches off the oil to the north. The left front wheel of the Steiner car was about four inches north of the center, and no part of it was on the south half of the oiled portion of the road. According to him, none of the Ambuehl Chevrolet was off of the oiled part of the road.

Ralph Henke, a witness called by the defendant, testified that accompanied by Elda Stueber, he was flagged down as he approached the two cars. He saw the position of Steiner's car on the road, saying its right rear wheel was about a foot and a half from the ditch on the north side of the road, and was off of the oiled strip. The other car was standing about "centerways" of the road.

This witness further testified that, with Miss Stueber, he called at the hospital the following morning and went to see plaintiff. He testified that Ambuehl told him that he had washed his car that afternoon, and that the windshield was wet and steamy, and that he couldn't see any too well because Steiner's lights shining on that moisture blinded him and in this testimony Miss Stueber concurs. Ambuehl denied having made the statement to Henke and Miss Stueber.

Lawrence Voegelé, a witness called by defendant,

testified that he visited the scene between 9 and 10 o'clock on the night of the accident and that the two cars were jammed together, with the Chevrolet sitting right in the middle of the road, heading east. Neither of the wheels of the Chevrolet were off on the shoulder on the south side of the road. Steiner's Ford was on the north side of the road and its right rear wheel was eight or ten inches north of the oiled part.

Another witness testified that the left rear wheel of defendant's car was about twenty inches north of the center of the road.

The errors tendered for our consideration by defendant are first that the court erred in not directing a verdict for defendant at the close of plaintiff's case, second that the court erred in not directing a verdict for the defendant at the close of all the evidence and third that the verdict is against the manifest weight of the evidence. An examination of the evidence in this case clearly convinces us that the court acted properly in denying the motions for a directed verdict both at the close of the plaintiff's case and at the close of all the evidence. We do not believe but that from the evidence in favor of plaintiff, standing alone and considered true, together with all legitimate inferences therefrom, the jury might not reasonably have found for plaintiff and we cannot weigh the evidence (MESCE v. CITY OF CHICAGO, 301 Ill. App. 430.) In this case there is a conflict in the testimony, and this court has not the right to set such judgment aside unless it is satisfied that it is manifestly against the weight of the evidence (PEOPLE v. DIECKELMANN, 367 Ill. 372)(JONES v. ESENBERG, 299 Ill. App. 551)(GRAHAM v. DRESSEN, 292 Ill. App. 15.) A careful examination of the evidence in this case persuades us and we so hold that the judgment in this case is not against the manifest weight of the evidence and should not be disturbed. A Court of Review has no right to substitute its opinion for that of the jury in cases of this nature so long as the verdict of the jury is supported by sufficient evidence (AVEY v. MEDARIS, 272 Ill. App. 209.)

The judgment of the Circuit Court of Madison County
is hereby affirmed.

Judgment Affirmed.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

October Term, A. D. 1940

FILED

MAR 1 1941

David E. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Term No. 4009

Agenda No. 6

JOSEPH FRIERDICH,
Plaintiff-Appellee,
vs.
City of BELLEVILLE,
Illinois,
Defendant-Appellant.

Appeal from the
Circuit Court of the
County of St. Clair

309 I.A. 438

DADY, J.

Defendant brings this appeal to review a judgment of the Circuit Court for \$1250. entered on a verdict in favor of plaintiff.

Plaintiff contends that while walking on a public sidewalk in the City of Belleville he was injured by reason of a defect in such sidewalk.

No question of pleading or of serving the statutory notice of injury is involved.

It is undisputed that the walk was 5-1/2 feet in width and extended from the curb to the wall of a building; that at the time in question there was in such walk a circular hole or depression about 12 inches in diameter, and that this hole was formerly filled with a telephone pole, the pole having been removed about seven years prior to the accident.

Plaintiff testified that on the night of August 29, 1938, while walking in the dark on such sidewalk, he stepped into such hole with his right foot, "up to the instep," and fell forward striking the sidewalk with his forehead and was rendered unconscious, and that he did not know of such condition of the walk before the accident. One witness for the plaintiff and two witnesses for the defendant testified that they found the plain-

tiff lying unconscious on the walk.

There was a conflict in the evidence as to the depth of the hole, plaintiff's evidence tending to show it was about 5 or 6 inches in depth, and defendant's evidence tending to show that the depth was from 1/4 of an inch to 1 inch.

That plaintiff has a permanent rupture is undisputed.

He testified that when he regained consciousness after the fall he noticed a sharp pain in his lower right side, and first discovered the rupture about a week or two after the accident. His doctor testified that he attended the plaintiff on the night of the accident, and that plaintiff then complained of tenderness and soreness over a scar left by a prior appendicitis operation. The doctor further stated that he first saw the rupture about 30 days after the accident, at which time the protrusion was about the size of a hen's egg; that it was a recent rupture and could be cured by a major operation at a cost of about \$200., which would require about two or three weeks hospitalization of plaintiff; that by such operation plaintiff would be prevented from working for 3 or 4 months; and that ruptures may be caused by strain, accident, injury or over-lifting. Defendant introduced no medical testimony.

Defendant contends that the court erred in not directing a verdict in favor of the defendant at the conclusion of all of the evidence, and that the verdict is manifestly against the weight of the evidence both on the question of liability and on the amount of damages. The only conflict in the evidence is as to the depth of the depression.

The rule is well established that in passing on a motion to direct a verdict it is not the province of a court of review to weigh conflicting evidence, but merely to inquire whether there is any evidence in the case tending to support the verdict. (Walsch v. Chicago Railway Co., 303 Ill. 339.) In our opinion there was sufficient evidence to submit the cause to a jury and it cannot be said from an examination of the evidence submitted that the verdict is manifestly against the weight

of the evidence or that the damages were excessive.

Plaintiff's attending physician was asked the following question, "I will ask you whether or not if he had a fall on the night when he came to you, had a severe fall on the pavement, fell face downward on the concrete pavement hard enough to render him unconscious for the time being, and hard enough to cause the pains you say he had in his back, I will ask you whether or not that fall may have resulted in this rupture?" The only objection to this question was, "I object to the question for the reason he said he examined him immediately after the fall, and he told us what happened then, and he didn't examine him for three weeks or a month later, and then found he was suffering from rupture. I don't think it is connected up." The witness replied, "That fall could have been an important factor in the causation of that rupture." No objection or motion to strike such answer was made. There was no merit whatever in the specific objection made at the time of the trial. It is now urged for the first time that the question and answer are based on conjecture, that the question is misleading and does not take into consideration all of the elements and that the opinion invades the province of the jury. The law is well settled that a specific objection made at the time of a trial is a waiver of all objections not specified and that a party will not be permitted to urge objections in a court of review which were not urged in the trial court. (Foreman v. DeMeter, 347 Ill. 72.) It was the duty of counsel to specifically point out at the time of the trial in what respect the question was misleading, in what manner it invaded the province of the jury, and what essential elements were omitted. Not having done so, these objections are without force on appeal. A party will not be allowed to omit specifying the error claimed and then in the event of an unfavorable verdict obtain a reversal on purely technical grounds.

Defendant contends that the trial court erred in permitting the plaintiff, over objection, to testify that at the time of the accident it was dark where the accident happened.

In his brief counsel says "this is clearly error," for the reason that the "complaint" does not even refer to lack of light or darkness. In our opinion there is no merit whatever to this objection.

Only one instruction asked by the defendant was refused. This instruction was fully covered by given instructions.

Only one instruction was given at the request of the plaintiff. This instruction told the jury that if they found from a preponderance of the evidence there was a "hole" in the sidewalk, that such "hole" etc. Defendant contends such instruction is "very suggestive" because it uses the word "hole" repeatedly instead of the word "depression," thereby "indicating there must be a hole." It is our opinion that if the jury believed the testimony of plaintiff's witnesses' to the effect that the circular cavity was five or six inches deep, then the jury would have been justified in finding such cavity constituted a hole in the sidewalk. The repetition of the word "hole" was not suggestive. The only other objection to such instruction is that the words "by a preponderance of the evidence" were not repeated before each proposition required by said instruction to be found by the jury. This criticism is also without merit. (See Leighton Steel Co. v. Snell, 217 Ill. 152.)

Affirmed.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

October Term, A. D. 1940

FILED

MAR 1 1941

David J. Mallett
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Abstract

Term No. 40016

Agenda No. 11

JOHN H. WETZEL and NORA
E. WETZEL,

Appellees,

v.

CHARLES PRUITT,

Appellant.

Appeal from the

Circuit Court of

Madison County,

Illinois.

DADY, J.

209 I.A. 438²

This suit, for moneys alleged to be due the plaintiffs from defendant, was instituted in justice court on September 10, 1937, and tried on appeal in the circuit court without a jury where a judgment was rendered in favor of the plaintiffs. Defendant appeals from this judgment.

From about November 1, 1930, to sometime in November, 1933, defendant was a tenant on a farm owned by plaintiffs. The suit was for unpaid rent and for the price of certain personal property alleged to have been sold by plaintiffs to defendant.

The first contention of defendant is that the present suit is barred by a former suit on the same account. Such former suit was instituted in justice court on June 27, 1934 by the plaintiff, John H. Wetzel, and against the defendant and resulted in a judgment in favor of the plaintiff. Defendant thereupon appealed to the circuit court where the case remained on the docket until January 15, 1935, when it was dismissed by the court for want of prosecution. An appeal was taken from the order of dismissal to this court and the judgment of the trial court was affirmed.

(Wetzel v. Pruitt, 289 Ill. App. 626)

The general rule is that a judgment on the merits is a bar to any further suit between the same parties on the same cause of action. (Harding co. v. Harding, 352 Ill. 417; Midlinsky v. Rubin, 341 Ill. 378.) However, the judgment sought to be set up as a bar in this suit was not rendered on the merits. The original suit was dismissed simply for want of prosecution which in effect amounted to no more than a voluntary non-suit. Therefore the judgment in such former suit is not a bar to the present suit. (Wood v. Maxwell, 238 Ill. App. 597.)

Defendants next contend that a large part of the plaintiffs' claim is barred by the Statute of Limitations. This contention is based on the fact that a number of items charged against the defendant accrued more than five years prior to the institution of the present suit. It appears from the evidence that the claim of the plaintiffs was based upon a book account which was admitted in evidence without objection. This account was made up by the plaintiffs at the time of the several transactions with the defendant and showed various debits and credits in connection with the occupancy of the plaintiffs' farm by the defendant commencing with November 1, 1930, and ending about November 1, 1933. In the account the defendant was charged not only with cash rent for the farm but also for items of personal property sold to him by the plaintiffs and for the use of stock. The account also showed that the defendant was given credit not only for items of cash which he paid at times but for material furnished by him to the plaintiffs and for labor, repairing, hauling, crops, caring for stock and similar items for which the defendant was entitled to be paid by the plaintiffs. A large portion of the account, both debits and credits, accrued after September 10, 1932, which was less than five years prior to the commencement of this suit. The account showed credits as late as August 16, 1933, and in addition plaintiff testified without contradiction that the defendant made an additional payment of Ten Dollars on the account in the month of March, 1934.

From the foregoing, it appears that there were mutual accounts between the plaintiffs on the one side and the defendant on the other, and that there were substantial items in the account which accrued less than five years prior to the filing of this suit. It has been held that under such circumstances the whole amount due upon the book account is relieved from the bar of the Statute of Limitations. (Miller v. Cinnamon, 168 Ill. 447; Carpenter v. Plagge, 192 Ill. 82) We think that these cases are decisive against the contention made by defendant.

Defendant's next and last contention is that the judgment is manifestly against the weight of the evidence. With this contention we do not agree. There was in our opinion ample evidence to justify the trial court in entering such judgment.

AFFIRMED.



Abstract

FILED

MAR 1 1941

STATE OF ILLINOIS

APPELLATE COURT

October Term, A. D. 1940

David J. Wallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Term No. 40023

Agenda No. 34

CLINT HAMILTON, ODESSA)
HAMILTON, JOHNNIE MAE)
BROOKS AND WALTER BROOKS,)
Plaintiffs and Appellees)
v.)
ALBERT STOCKE,)
Defendant and Appellant.)

Appeal from
Circuit Court of
Alexander County,
Illinois
- - -
Honorable
Lloyd M. Bradley,
Judge Presiding.

309 I.A. 439

DADY, J.

This is an automobile accident case, tried before the court without a jury. Judgment was entered in favor of each of the four plaintiffs, from which judgment the defendant appeals.

Each plaintiff, respectively, by a separate count in the complaint, charged that such plaintiff was injured through the negligence of the defendant. Each plaintiff, respectively, by another separate count, charged that defendant wilfully and wantonly drove his automobile at a high and dangerous rate of speed across the center of the pavement and against the automobile in which such plaintiff was riding or driving, and that such collision "was caused by one or more of the following wilful and wanton acts of defendant, (a) * * * (b) * * * (c) Wilfully and wantonly and with a conscious indifference to the surrounding circumstances, and with no regard to the safety of others, then and there, while in an intoxicated condition, drove his motor vehicle at a high rate of speed * * * across the center line of said highway and against the automobile in which" such plaintiff was riding (or driving.)

The accident occurred on September 11, 1938, about three P. M., on U. S. Highway 51, four miles north of Cairo. The plaintiff Clint Hamilton was driving southerly and the other



plaintiffs were passengers in his car, and defendant was driving northerly on the same highway, when the two cars collided. There was a sharp conflict in the testimony as to the position of the two cars at and immediately before the accident. Each plaintiff testified that the Hamilton car was on the west half of the road and following closely behind a taxi cab, when the cab suddenly pulled to the right or westerly side of the road and at that moment defendant's car was but a short distance away and coming down the center of the road at a high rate of speed and crashed into the Hamilton car at a time when the Hamilton car was on the right or westerly half of the road. This testimony of the plaintiffs was corroborated by the driver of and the one passenger in the taxi cab, both of whom were apparently disinterested witnesses.

Defendant and his wife, who was riding with him, denied that any portion of the defendant's car was on the west half of the road, but testified that defendant was going about 40 or 45 miles an hour on the easterly half of the road when the Hamilton car suddenly crossed to the easterly half of the road and the collision occurred. This testimony of the defendant and his wife was corroborated by the testimony of four apparently disinterested witnesses who testified they were at an artesian well on the side of the road and almost opposite the place of the accident, that they saw the collision and that at the time of such collision all of the Stocke car and a substantial portion of the Hamilton car were on the easterly half of the pavement and that the Stocke car was at all times on the easterly half of the pavement.

Only four witnesses testified on the subject of defendant's alleged intoxication. For the plaintiffs a State highway patrolman testified that he arrived at the scene of the accident shortly after the accident and found a half pint bottle of whiskey in the defendant's car and that "about possibly" one and one-half inches of the whiskey was gone, and a doctor testified that on the "afternoon" of the day of the accident he observed the defendant at a hospital, that the defendant "had been drinking heavy I think

without a doubt," that "my statement is made entirely from the odor of his breath and the history given by his little daughter, * * * I detected alcohol strongly on his breath." On cross examination the doctor admitted that at the coroner's inquest he had testified "You could detect alcohol on his breath. I couldn't make a statement as to whether or not he (the defendant) was drunk or intoxicated, but you could smell liquor on his breath, that was definite." The wife of defendant testified that the defendant "drank two bottles of beer that day," the first before dinner and the last about one-thirty, and that defendant did not have anything else to drink that she knew of. Defendant testified that the pint bottle of whiskey was sealed and in the glove compartment; that he had not taken any of the whiskey and the only alcoholic liquor he drank that day was two bottles of beer and he was not intoxicated or under the influence of liquor.

At the conclusion of the trial the court made a finding "that the defendant is guilty under the wilful and wanton count in the complaint of driving under the influence of liquor," and assessed the damages of each plaintiff. Thereafter the court entered judgment "on such finding" in favor of each plaintiff and against the defendant for the amount of damages so assessed.

Defendant first contends that the finding that defendant was under the influence of intoxicating liquor is contrary to the manifest weight of the evidence. The testimony favorable to the plaintiffs, if true, showed that defendant drove down the center or on the westerly and wrong side of the road at a rate of speed that was high and dangerous under the circumstances, and against the Hamilton car with a reckless disregard for the safety of plaintiffs. To be guilty of wilful and wanton misconduct it was not necessary that the defendant at such time be under the influence of liquor. However, competent evidence favorable to plaintiffs, if true, further showed that during the day defendant had drunk some intoxicating liquor, and that a short time after the accident, without drinking in the meantime, the defendant had a strong odor of alcohol on his breath. Evidently the trial judge believed all of such testimony of the defendant and his wife. Assuming such

Abstract

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

FILED

MAR 15 1941

David J. Mallett
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

October Term, A. D. 1940.

Term No. 40026

Agenda No. 26.

LACLEDE GRIFFEN,
Plaintiff-Appellant,
v.
SCHUBERT COAL COMPANY,
A Corporation,
Defendant-Appellee.

Appeal from the
Circuit Court of
St. Clair County

309 I.A. 439²

DADY, J.

This is a suit for personal injuries. At the conclusion of all of the evidence defendant moved for a directed verdict, on which motion the trial court reserved its ruling. A jury returned a verdict of \$1500. in favor of plaintiff. Thereupon defendant moved for a judgment notwithstanding the verdict, which motion the trial court granted and entered judgment in favor of defendant and against plaintiff. Plaintiff appeals.

The defendant operates a coal mine. Defendant maintained on its property an elevated structure equipped with coal chutes. The structure was built so that patrons could drive their trucks under the chutes and load coal therefrom. Coal was carried from the ground to a washer bin in the structure by means of a conveyor located in close proximity to one of the chutes. This conveyor was in the shape of a trough and was about 20 feet in length, with sides about 25 inches in width and a bottom about 20 inches in width. It was placed at an angle, the lower or easterly end being on the ground and the upper or westerly end about 15 feet above the level of the ground.

The coal was carried or dragged up through the conveyor

by means of a belt propelled by two endless parallel chains. The chains were made of flat links fastened or held together by cotterpins. The two chains were connected by cross-bars of iron three inches high placed at right angles to the chains and spaced at intervals of about 24 inches. These cross-bars served the purpose of catching and holding the coal as the belt moved upward and inside the conveyor to the bins located in the structure. The lower half of the belt returned to the ground under the bottom of the conveyor just above two 2x4 pieces of wood, one 2x4 being placed along and on each side of the conveyor. These 2x4's were held in place by upright bars of iron bolted to the sides of the conveyor and the 2x4's. A space or slot of about two to three inches in width existed between the top of the 2x4's and the bottom of the conveyor proper, through which space or slot the chain belt moved downward toward the ground. This space or slot was open and unguarded.

The plaintiff, a farmer, was the only eye witness to the accident. He testified that on January 13, 1939, he drove his truck to the mine to get some coal; that the mine foreman told him he could "back in from the west side;" that thereupon he backed his truck easterly and under one of such chutes where it would unload into the truck; that he then opened the chute and started loading his truck; that after his truck was partly loaded, in order to spread the coal evenly in the box of his truck, he stood on the side of the bed of the truck and under the conveyor, and while so leveling such coal with a shovel held in his right hand he was in a leaning position and placed his left hand on a board on the outside of the side wall of the conveyor; that his left hand while so placed was flat and almost straight up and down against the wall side of the conveyor, and over the slot and not inside of the outer edge of the chain; that he didn't stick his hand in the chain, and didn't see anything but a board; that while in this position and trying to so level his load "something

hit" his left hand "just above the joint of my first finger"; that the something that hit his hand came from the west and "stuck out beyond the level of this board," and that "the object that hit my finger almost cut it off."

At the time of his injury plaintiff was wearing a cotton glove on his left hand. In the accident the first finger of his left hand was cut off at the first phalanx close to the metacarpal bone, and in treating him the entire first finger of his left hand was amputated by the doctor.

Plaintiff further testified that he had been at the mine many times before, but that this was the only time he had backed in from the west; that he had never previously seen or looked into the conveyor in question; that when he had previously gotten coal he had gotten it either from the north or south side; that when he put his hand on the side of the conveyor he didn't see anything but a board and he laid his hand against the board; that when injured he looked to see what happened and then saw the chain running.

On cross examination he testified that previous to and at the time of the injury he possessed and was familiar with farm machinery and had a conveyor that operated somewhat like the conveyor in question; that he knew there was a lot of machinery at the mine and lots of it might be dangerous; that he saw and knew the carrier in question was a conveyor and saw it running, but did not notice until afterwards that there was a chain running at the edge of the conveyor; that something stuck out from the side of the conveyor; that he didn't know what it was because he didn't see it; that he wasn't certain whether if he had looked he could have seen in the slot because it was fairly dark.

On cross examination he further testified that he told the doctor who attended him that his hand got caught in the chain.

A witness for the defendant testified that after the accident he went over to the conveyor and looked at it; that he examined the sides of the conveyor while it was in operation; that there wasn't anything sticking out from the sides and there

around said chain belt, although said chute was located close to and in reach of persons loading coal on trucks; that the defendant negligently permitted one or more ribs or parts of the chain to extend and protrude outward from the sides of the chain belt; that the defendant knew or in the exercise of due care should have known that persons so loading coal into trucks were likely to and would place their hands on said chute; that plaintiff without knowledge of the conditions of said chute as stated, while leveling coal in the bed of his truck, placed his left hand on the edge or outside of said chute and thereby, as a direct and proximate result of defendants' negligence as aforesaid, a protruding rib or other protuberance on said chain belt caught or struck his hand so placed and as a result plaintiff was injured; and that the plaintiff at all times in question was using due care for his own safety.

Applying the foregoing rules of law to the instant case, it was the duty of the trial court in passing upon the motion for judgment notwithstanding the verdict to assume as true all of the evidence most favorable to the plaintiff, disregarding all contradictory evidence; to assume that plaintiff had backed his truck under the chute as directed by the nine foreman, and that at the time of the injury the place was fairly dark; that the plaintiff's left hand was laid flat and almost straight up and down on the outside of the side wall of the conveyor and across the slot; that while plaintiff's hand was in this position something that came from the west, which was to his left, hit his left hand causing the injury in question; that at such time his left hand was not inside of the outer edge of the chain and that he did not stick his left hand in the chain; that this was the only time he had backed his truck in from the west; and that he had never previously looked into the conveyor and had not seen the chain. In reviewing such action of the trial court this court must also assume such evidence to be true. Assuming such evidence to be true we believe such evidence fairly tends to prove the

charge in the complaint that the plaintiff was injured by some protuberance on the chain belt.

Plaintiff occupied the position of a business invitee on the premises. An owner or occupant of premises who by invitation invites others to go upon such premises for any lawful purpose is liable for injuries occasioned by the unsafe condition of such premises if such condition was known to him and not to them, and was negligently suffered to exist without timely notice to the public or to those who are likely to act upon such invitation, and if there are hidden dangers upon such premises he must use ordinary care to give persons rightfully upon the premises warning thereof. (Calvert v. Springfield, 231 Ill. 290.) Applying this rule of law we believe the evidence fairly tends to prove that there was a protuberance on the chain; that such protuberance was a hidden danger which the jury might have believed from the evidence was or should have been known to the defendant and unknown to the plaintiff; and that the question of whether in fact such evidence was true, and whether the defendant was negligent, was a question of fact for the jury and not a question of law for the court. (Hicks v. Swift, 285 Ill. App. 1).

In our opinion such evidence also fairly tends to prove that the plaintiff was at the time in question in the exercise of reasonable care for his own safety. Whether as a matter of fact he was in the exercise of such reasonable care was also a question of fact for the jury. (Pienta v. C. C. Ry. Co., 284 Ill. 246.)

From the foregoing it is our opinion that the trial court erred in granting the motion of the defendant for a judgment notwithstanding the verdict and in entering such judgment.

The next question is one of procedure. The defendant having made no motion for a new trial, the plaintiff contends that the judgment of the trial court should be reversed and that this court should enter judgment in favor of the plaintiff on the verdict in accordance with the provisions of paragraph 3c of section 68 of the Civil Practice Act. In Sprague v. Goodrich, case

number 25762, opinion filed February 14, 1941, not yet published, our Supreme Court said: " * * * paragraph 3c of section 68, in so far as it purports to grant power to the Appellate Court to * * * enter judgment on the verdict of the jury, is unconstitutional * * *."

The judgment of the circuit court is therefore reversed and the cause is remanded to such court with directions to overrule the motion of the defendant for a judgment in favor of the defendant notwithstanding the verdict, and to pass upon a motion for a new trial, if one shall be made, and if such motion for a new trial is overruled, or if a motion for a new trial is not made, to enter judgment on the verdict.

Reversed and remanded.

41378

CHRISTINA M. CARLEN,

Appellee,

v.

HARRY C. COTTRELL,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

309 I.A. 440

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

February 8, 1940, the owner and holder of a mortgage bond for \$500 brought suit against defendant, the maker, to recover the face amount of the bond with interest. The bond and what is designated "FORM OF EXTENSION AGREEMENT" were attached to and made a part of the statement of claim. Defendant filed his affidavit of merits which, on motion of plaintiff, was stricken. Defendant elected to stand on his affidavit of merits and thereupon judgment was entered against defendant for the amount of plaintiff's claim and defendant appeals.

The only question involved is the sufficiency of defendant's affidavit of merits.

The record discloses that defendant, February 16, 1926, executed his bonds aggregating \$30,000, of which the bond in suit was one, secured by a mortgage on Chicago real estate. The bond in question was due and payable February 16, 1931. Afterward Regina Halpin became the owner of the premises and January 3, 1933, executed "FORM OF EXTENSION AGREEMENT" annexed to the bond above mentioned.

It is recited in that document that Halpin is the owner of the premises described in the trust deed securing the payment of the bond issue of which \$25,000 was still unpaid; that the bonds and trust deed had been executed by defendant Cottrell, the former owner of the property, and that the holder of the "annexed bond in accordance with the terms of a certain extension agreement, dated as of January 3, 1933, between said owner and the then holders of this bond *** for value received hereby agrees with the said undersigned that the time of payment of the annexed bond, the principal of which

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February 8, 1935, the owner and holder of a mortgage bond for \$500 brought suit against defendant, the maker, to recover the face amount of the bond with interest. The bond and what is designated "FORM OF EXTENSION AGREEMENT" were attached to and made a part of the statement of claim. Defendant filed his affidavit of merits which, on motion of plaintiff, was stricken. Defendant elected to stand on his affidavit of merits and thereupon judgment was entered against defendant for the amount of plaintiff's claim and defendant appeals.

The only question involved is the sufficiency of defendant's affidavit of merits.

The record discloses that defendant, February 18, 1935, executed his bonds aggregating \$50,000, of which the bond in suit was one, secured by a mortgage on Chicago real estate. The bond in question was due and payable February 18, 1936. Defendant began Halpin became the owner of the premises and January 5, 1935, executed "FORM OF EXTENSION AGREEMENT" annexed to the bond above mentioned. It is recited in that document that Halpin is the owner of

the premises described in the trust deed securing the payment of the bond issue of which \$25,000 was still unpaid; that the bonds and trust deed had been executed by defendant Gottlieb, the former owner of the property, and that the holder of the annexed bond in accordance with the terms of a certain extension agreement, dated as of January 3, 1935, between said owner and the then holders of this bond *** for value received hereby agrees with the said undersigned that the time of payment of the annexed bond, the principal of which

originally matured February 16, 1931, shall be and is hereby extended to February 16, 1939"; etc.

In his affidavit of merits which is quite lengthy, defendant admits the making of the bonds and trust deed and avers \$5000 of the \$30,000 bond issue is paid; that December 29, 1926, he sold the premises subject to the lien of the trust deed. The material parts of the affidavit of merits are that defendant denies any liability on the bond and avers the "original liability of this defendant *** was extinguished on January 3, 1933 by an agreement of novation entered into on that date between Regina Halpin and Jacob Best, L. T. Kelley, S. T. Kiddoo, Edwin L. Reed and H. D. Pettibone, constituting a committee for the holders of bonds"; that neither of the persons who owned the property after the conveyance by defendant Cottrell and prior to January 3, 1933, had assumed or agreed to pay the principal or interest on the bonds; that Halpin failed to pay interest on the bonds after August 16, 1930 to and including February 16, 1931, and she failed to pay the \$25,000, the par value of the bonds, which came due February 16, 1939; that about March 20, 1931, the bondholders' committee then owning all the unpaid bonds, filed a bill to foreclose the lien of the trust deed in the Superior court of Cook county; that the trustee entered into ^{and} possession, collected the rents; that defendant Cottrell was not served in that case with process and did not appear; that about December, 1932, Halpin proposed to the bondholders' committee to enter into a new agreement with them "under which the debt and obligation of this defendant was to be extinguished and the obligation of Regina Halpin was to be substituted therefor, ***

"That an agreement of novation was in fact entered into in writing on January 3, 1933" between Halpin and the committee upon the terms proposed by Halpin; "that said novation agreement was intended by said Regina Halpin and said committee and the holders of all of said bonds to accomplish the substitution of the obligation of Regina Halpin under said novation agreement for the obligation

originally returned February 16, 1931, shall be and is hereby amended to February 16, 1932"; etc.

In his affidavit of service which is quite lengthy, defendant admits the making of the bonds and states that on or about February 16, 1930, he sold the premises subject to the lien of the bonds. The material parts of the affidavit of service are that defendant denies any liability on the bond and states the "original liability of this defendant was

was extinguished on January 3, 1933 by an agreement of novation entered into on that date between Regina Halpin and Jacob Best, Jr., T. Kelley, S. T. Kiddoo, Edwin A. Reed and H. B. Pettibone, constituting a committee for the holders of bonds"; that neither of the persons who owned the property after the conveyance by defendant Cottrell and prior to January 3, 1933, had assumed or agreed to pay the principal or interest on the bonds; that Halpin failed to pay

interest on the bonds after August 15, 1930 to and including February 16, 1931, and she failed to pay the \$25,000, the par value of the bonds, which came due February 16, 1931; that about March 30, 1931, the bondholders' committee then owning all the unpaid

bonds, filed a bill to foreclose the lien of the trust deed in the Superior Court of Cook County; that the trustees entered into possession, collected the rents; that defendant Cottrell was not served in that case with process and did not appear; that about

December, 1932, Halpin proposed to the bondholders' committee to enter into a new agreement with them "under which the debt and obligation of this defendant was to be extinguished and the obligation of Regina Halpin was to be substituted therefor," and

"that an agreement of novation was in fact entered into in writing on January 3, 1933" between Halpin and the committee upon the terms proposed by Halpin; "that said novation agreement was intended by said Regina Halpin and said committee and the holders of all of said bonds to accomplish the substitution of the obligation of Regina Halpin under said novation agreement for the obligation

of this defendant upon said bonds and to effect the extinguishment of the obligation of this defendant upon all of said bonds"; that the indebtedness should primarily be discharged out of the rents and profits derived from the premises; that \$2000 of the principal was paid "out of the sinking fund provided for under said novation agreement of January 3, 1933"; that there was still outstanding and unpaid under the terms of the novation agreement \$25,000; that the fair cash value of the property was in excess of \$25,000; that if the premises had been sold the entire indebtedness would have been paid; that prior to the novation agreement of January 3, 1933, the committee had the legal right to enforce payment of the balance due on the bonds against the defendant Cottrell, but no demand was made upon him until the suit at bar was brought; that if the committee and holders of the bonds had asserted such right against defendant Cottrell, he would have been subrogated to the rights of the committee; "that said novation agreement was intended to be and was in fact a substitution of the obligation of Regina Halpin for the obligation of this defendant *** it was the purpose and effect of said novation agreement that the obligation of this defendant to pay the indebtedness *** should be superseded by the new agreement ***"; that the "bondholders *** are now estopped to assert any claim against this defendant"; that pursuant to the novation agreement the committee dismissed the foreclosure suit; that the defendant Cottrell "has suffered damage to the extent of the value of said premises on February 16, 1931, *** or, in the alternative, on January 3, 1933, the date of the making of the said novation agreement; and that this defendant is entitled to recoup against the amount claimed by the plaintiff *** 1/50th of the value of the said premises" on February 16, 1931, "or in the alternative on said January 3, 1933."

The specific ground set up by plaintiff in her motion to strike the affidavit of merits was that the bond provided: "If the time of payment of this bond, or any part thereof, be extended by the holder or holders hereof at any time or times, the maker ***

of this defendant upon said bonds and to effect the extinguishment of the obligation of this defendant upon all of said bonds; that the indebtedness should primarily be discharged out of the profits and profits derived from the premises; that \$2000 of the principal was paid "out of the sinking fund provided for under said novation agreement of January 3, 1933"; that there was still outstanding and unpaid under the terms of the novation agreement \$23,000; that the fair cash value of the property was in excess of \$23,000; that if the premises had been sold the entire indebtedness would have been paid; that prior to the novation agreement of January 3, 1933, the committee had the legal right to enforce payment of the balance due on the bonds against the defendant Cottrell, but no demand was made upon him until the suit at bar was brought; that at the committee and holders of the bonds had asserted such right against defendant Cottrell, he would have been subjected to the rights of the committee; that said novation agreement was intended to be and was in fact a substitution of the obligation of Regina Walpin for the obligation of this defendant; it was the purpose and effect of said novation agreement that the obligation of this defendant to pay the indebtedness should be superseded by the new agreement; that the "bondholders" are now entitied to assert any claim against this defendant; that pursuant to the novation agreement the committee dismissed the foreclosure suit; that the defendant Cottrell has suffered damage to the extent of the value of said premises on February 18, 1931, or, in the alternative, on January 3, 1933, the date of the making of the said novation agreement; and that this defendant is entitied to recover against the amount claimed by the plaintiff 1/50th of the value of the said premises on February 18, 1931, or in the alternative on said January 3, 1933.

The specific ground set up by plaintiff in her motion to strike the affidavit of merits was that the bond provided: "If the time of payment of this bond, or any part thereof, be extended by the holder or holders thereof at any time after the date of the

hereof and of any person or persons hereafter assuming the payment hereof, *** shall be held *** to consent to such extension, and shall, notwithstanding such extension, continue liable to the holder or holders hereof and shall pay the same when due, whether due by the terms of such extension agreement or by acceleration of maturity by election as herein and in said trust deed provided."

Defendant contends he was released from liability on the bond by the "agreement of novation entered into between Regina Halpin and the then owners of the bond" which presented a meritorious defense and should have been submitted to a jury. We think this contention cannot be sustained. It is obvious that practically all of the allegations of the affidavit of merits above referred to concerning the claimed novation agreement are but mere conclusions and the motion to strike does not admit such conclusions.

The claimed novation agreement is not in the record nor is the agreement extending the time of payment which is referred to in the "FORM OF EXTENSION AGREEMENT" attached to the bond from which we have above quoted. The motion to strike does not admit the allegations of the affidavit of merits that by the terms of the claimed agreement of novation it was the intention of the parties to extinguish defendant's liability on the bonds and to substitute in lieu thereof the obligation of Halpin. This is set up a number of times in the affidavit of merits and is obviously but a conclusion of the pleader. Facts should be stated.

Counsel for defendant say that "Where a mortgagee agrees with the mortgagor's grantee to extend the time of payment of the mortgage notes, and the mortgagor does not agree to such extension, the mortgagor is discharged to the extent of the value of the mortgaged premises at the time of the extension." We have held this to be the law. Kazunas v. Wright, 286 Ill. App. 554. And continuing counsel say: "The provision in the bond that the maker shall be held to consent to the extension of the time of payment thereof is a drastic provision and should be strictly construed and not

...and of any person or persons before the court
hereof, *** shall be held *** to consent to such extension, and
shall, notwithstanding such extension, continue liable to the
holder or holders hereof and shall pay the same when due, whether
due by the terms of such extension agreement or by acceleration of
maturity by election as herein and in said trust deed provided.
Defendant contends he was released from liability on the
bond by the "agreement of novation entered into between Halpin
Halpin and the then owners of the bond" which constituted a novation
between Halpin and the then owners of the bond, and should have been admitted to a jury. He claims
this contention cannot be sustained. It is obvious that practically
all of the allegations of the affidavit of merit above referred to
concerning the alleged novation agreement are not mere conclusions
and the motion to strike does not admit such conclusions.
The alleged novation agreement is not in the record nor is
the agreement extending the time of payment which is referred to
in the "FORM OF EXTENSION AGREEMENT" attached to the bond from
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with the mortgagor's grantee to extend the time of payment of the
mortgage note, and the mortgagor does not agree to such extension,
the mortgagor is discharged to the extent of the value of the
mortgaged premises at the time of the extension." We have held in
the case of Halpin v. Halpin, 101 Cal. 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

permitted to control where the extension was granted almost two years after the maturity of the bond and after the filing of a bill to foreclose the trust deed securing the bonds." The bonds provide "If the time of payment of this bond, or any part thereof, be extended by the holder or holders hereof at any time or times, the maker or guarantors hereof and of any person or persons hereafter assuming the payment hereof, or any part hereof, shall be held hereby to consent to such extension, and shall, notwithstanding such extension, continue liable to the holder." This provision is plain and unambiguous and must be given effect. It provides that if the time of payment be extended "at any time or times" the maker shall be held to consent to such extension and shall be liable. Kent v. Rhomberg, 288 Ill. App. 328.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Matchett, J., and McSurely, J., concur.

permitted to control where the extension was granted almost two years after the maturity of the bond and after the filing of a bill to foreclose the trust deed securing the bond. The bond provides "if the time of payment of this bond, or any part thereof, be extended by the holder or holders hereof at any time or times, the maker or guarantors hereof and of any person or persons respectively assuming the payment hereof, or any part thereof, shall be held liable by to consent to such extension, and shall, notwithstanding such extension, continue liable to the holder." This provision is plain and unambiguous and must be given effect. It provides that if the time of payment be extended "at any time or times" the maker shall be held to consent to such extension and shall be liable. Land v. Wagoner, 202 Ill. 141, 142.

The judgment of the Municipal Court of Chicago is affirmed.

FORWARDED BY MAIL.

RECEIVED: JULY 11, 1907. 11:00 AM.

41403

CARL A. JOHNSON,

Appellant,

v.

IRENE M. WATSON, EARL C. LEONARD,
BESSIE MILNER and CHICAGO CITY BANK
& TRUST COMPANY, a Corporation, as
Trustees under Trust No. 2422,
Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

309 C.A. 440²

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Carl A. Johnson, the assignee of a judgment for \$585.28 (entered in the Municipal court of Chicago November 10, 1937, in favor of the Eastman Coal Company against Irene M. Watson and Earl C. Leonard), filed his complaint against defendants March 30, 1939, to enforce the payment of the judgment against the interest of the judgment debtors in an apartment building located at 5200-5212 Dorchester avenue, Chicago. Afterward, April 3, 1939, Rose Shaffer filed an intervening petition in which she set up that she had obtained a judgment in the Municipal court of Chicago against defendant Earl C. Leonard and prayed she might join as party plaintiff. Ten days thereafter she assigned her judgment, which was for \$12,201.75, to plaintiff for \$600. After the issue was made up an order was entered June 16, 1939, in which it is stated "that the calendar of the Master in Chancery of this court is in such condition that said Master in Chancery cannot give a speedy hearing in this cause," and a special commissioner was appointed to whom the case was referred who took the evidence, made up his report and found, among other things, that Joseph F. Kyle is the assignee and owner of the two judgments which were the basis of the suit; that while he was acting as agent of defendants, Irene M. Watson and Earl C. Leonard, he learned of the two judgments and purchased them from the judgment creditors paying \$100 to the judgment creditor, Eastman Coal Company, and \$600 to Rose Shaffer, the other judgment creditor; that by reason of the confidential relation existing between Kyle

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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MR. PRESIDING JUDGE: I'LL LEAVE THE OPINION OF THE COURT.

that by reason of the confidential relation existing between Kyle Coal Company, and Rose Shaffer, the other judgment creditor; the judgment creditors paying \$100 to the judgment creditor, Eastman U. Leonard, he learned of the two judgments and purchased them from while he was acting as agent of defendants, Irene M. Watson and Earl G. Leonard, among other things, that Joseph F. Kyle is the assignee and case was referred who took the evidence made up his report and this cause," and a special commissioner was appointed to whom the addition that said Master in Chancery cannot give a speedy hearing in calendar of the Master in Chancery of this court is in each con- order was entered June 18, 1930, in which it is stated "that the \$12,501.75, to plaintiff for \$600. After the same was made up an Ten days thereafter she assigned her judgment, which was for ant Earl G. Leonard and prayed she might join as party plaintiff. tained a judgment in the Municipal Court of Chicago against defend- filed an intervening petition in which she set up that she had ob- judgment debtors in an apartment building located at 3200-3212 enforce the payment of the judgment against the interest of the (Leonard), filed his complaint against defendants March 30, 1930, to of the Eastman Coal Company against Irene M. Watson and Earl G. started in the Municipal Court of Chicago November 24, 1929, to favor

JURY - 10 minutes, The reading of a document for about 10 min-

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and Leonard a constructive trust arose and that the judgment debtors should pay plaintiff \$700 for the use of Kyle and Paul Caspers from whom Kyle testified he had borrowed \$2100, part of which he used to buy the judgments, and that they be required to satisfy the judgments of record.

The commissioner further found that the two judgments were not a lien on the equitable life estates of the judgment debtors, Leonard and Mrs. Watson, on the Dorchester avenue property and that the costs be taxed one-half against plaintiff and the other one-half against the two judgment creditors and Bessie Milner, who held title to the property at the time of the hearing.

Objections to the report were filed by each side, they were overruled and ordered to stand as exceptions; the court sustained some of them, overruled others and entered a decree finding there was a balance of \$108.50 due and owing from plaintiff to the special commissioner and that Leonard and Mrs. Watson pay plaintiff \$700 for the use of Kyle and Caspers within ninety days; that upon such payment plaintiff or his attorneys execute and file satisfaction of the judgments entered in the Municipal court. It was further ordered that the cause be dismissed. It is from this decree plaintiff appeals.

The record discloses that in 1920 Estelle G. Leonard purchased the building in question known as 5200-5212 Dorchester avenue, Chicago, for about \$64,000; that the next year, December 24, 1921, she conveyed the property to Earl G. Leonard, her son, and Irene M. Watson, her daughter, two of defendants, and April 27, 1932, they in turn conveyed the premises to Dorothea E. Watson, Irene's daughter. On the same day Dorothea E. Watson conveyed the property to Estelle G. Easton (the mother of Leonard and Mrs. Watson), who in the meantime had remarried. January 19, 1937, the mother, Mrs. Easton, conveyed the premises with other real property in trust to the Chicago City Bank and Trust Company. By the terms of the trust

and Leonard a constructive trust arose and that the judgment debtors should pay plaintiff \$700 for the use of Kyle and Paul Capers from whom Kyle testified he had borrowed \$100, part of which he used to buy the judgments, and that they be required to satisfy the judgments of record.

The commissioner further found that the two judgments were not a lien on the equitable life estates of the judgment debtors, Leonard and Mrs. Watson, on the Rochester Avenue property and that the costs be taxed one-half against plaintiff and the other one-half against the two judgment creditors and Beattie Wilner, who held title to the property at the time of the hearing.

Objections to the report were filed by each side, they were overruled and ordered to stand as exceptions; the court sustained some of them, overruled others and entered a decree finding there was a balance of \$108.50 due and owing from plaintiff to the special commissioner and that Leonard and Mrs. Watson pay plaintiff \$700 for the use of Kyle and Capers within ninety days; that upon each payment plaintiff or his attorneys execute and file satisfaction of the judgments entered in the Municipal Court. It was further ordered that the cause be dismissed. It is from this decree plaintiff appeals.

The record discloses that in 1920 Estelle G. Leonard purchased the building in question known as 3200-5112 Rochester Avenue, Chicago, for about \$64,000; that the next year, December 24, 1921, she conveyed the property to Earl G. Leonard, her son, and Irene M. Watson, her daughter, two of defendants, and April 27, 1922, they in turn conveyed the premises to Dorothy M. Watson, Irene's daughter. On the same day Dorothy M. Watson conveyed the property to Estelle G. Watson (the mother of Leonard and Mrs. Watson), who in the meantime had remarried. January 12, 1927, the mother, Mrs. Watson, conveyed the premises with other real property in trust to the Chicago City Bank and Trust Company. By the terms of the trust

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agreement one-half of the earnings, avails and proceeds of the real estate was for the benefit of Leonard during his life and thereafter other persons; the other half for the benefit of Irene M. Watson, and upon her death other persons. The interest of the parties was expressly stated to be deemed personal property and the bank was to deal with the property only when authorized to do so in writing by Leonard and Mrs. Watson, and in the event of their deaths, by other persons. The bank had no other duties to perform. The beneficiaries were to manage and control the property.

A little more than a year after Mrs. Easton conveyed the property to the bank, her son and daughter, Leonard and Mrs. Watson, at her request directed the bank to transfer the property back to Mrs. Easton, which was done. About six months afterward, August 4, 1938, Mrs. Easton conveyed the property to Bessie Milner and *et* about two weeks thereafter Bessie Milner } conveyed the property to her daughter, Dorothea Hayes. March 24, 1939, Mrs. Hayes conveyed the property back to Bessie Milner "where the title now rests."

The evidence is to the effect that Joseph F. Kyle was in the real estate business on the south side of Chicago and had known defendant, Earl C. Leonard, for many years. Leonard was also engaged in the real estate business in the same section of the city. Leonard had managed the property, renting it, collecting rents, etc., from 1930 to 1939, and for seven years had his office in the building. The building was heavily mortgaged and the rents were being collected by Leonard and turned over to the mortgagee, the Penn Mutual Life Insurance Company.

About March 14, 1939, Kyle met Leonard at which time Leonard was the receiver of the building at 5500 Everett avenue, in Chicago, having some time prior been appointed by one of the judges of the Superior court of Cook county. At that time Leonard told Kyle he was having some trouble with the court regarding his final account as receiver, it being contended he had not accounted for all the moneys, and apparently he was not getting along well with his

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agreement one-half of the earnings, avails and proceeds of the real estate was for the benefit of Leonard during his life and thereafter other persons; the other half for the benefit of Leonard, Watson, and upon her death other persons. The interest of the parties was expressly stated to be deemed personal property and the bank was to deal with the property only when authorized to do so in writing by Leonard and Mrs. Watson, and in the event of their deaths, by other persons. The bank had no other duties to perform. The beneficiaries were to manage and control the property.

A little more than a year after Mrs. Watson conveyed the property to the bank, her son and daughter, Leonard and Mrs. Watson, at her request directed the bank to transfer the property back to Mrs. Watson, which was done. About six months afterwards, August 4, 1938, Mrs. Watson conveyed the property to Bessie Milner and about two weeks thereafter Bessie Milner conveyed the property to her daughter, Dorothea Hayes. March 24, 1939, Mrs. Hayes conveyed the property back to Bessie Milner "where the title now rests."

The evidence is to the effect that Joseph E. Kyle was in the real estate business on the south side of Chicago and had known defendant, Earl C. Leonard, for many years. Leonard was also engaged in the real estate business in the same section of the city. Leonard had managed the property, renting it, collecting rents, etc. from 1930 to 1934, and for seven years had his office in the building. The building was heavily mortgaged and the rents were being collected by Leonard and turned over to the mortgagee, the First National Life Insurance Company.

About March 14, 1939, Kyle met Leonard at which time Leonard was the receiver of the building at 5800 Everett Avenue, in Chicago, having some time prior been appointed by one of the judges of the superior court of Cook County. At that time Leonard told Kyle he was having some trouble with the court regarding his financial account as receiver, it being contended he had not accounted for all the money, and apparently he was not getting along well with the

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counsel. Kyle suggested he see other counsel and shortly thereafter Kyle and Leonard saw the new counsel, Mr. Lyle H. Rossiter, who took up the matter and after some negotiations with opposing counsel prepared a supplemental report for receiver Leonard which showed there was \$3901 due from the receiver. Shortly thereafter Leonard discharged Rossiter but prior to that time it was suggested that Kyle buy the equity of Leonard and other persons in the Dorchester avenue property. There were some negotiations and drafting of papers with this end in view. Kyle, apparently for this purpose, borrowed \$2100 from Paul Caspers, but the matter fell through. During these negotiations it appears that in checking up the title of the property the two judgments involved in this suit were disclosed and shortly after the matter of buying the property failed, Kyle, on March 29, 1939, bought the Eastman Coal Company judgment for \$100 and on the next day filed the instant suit to enforce the payment of that judgment out of the Dorchester avenue property. Four days thereafter, Rose Shaffer, who had ^{theretofore} ~~theretofore~~ obtained a judgment of more than \$12,000 against Leonard, intervened praying that she be made a party plaintiff and shortly thereafter, April 13, 1939, Kyle bought this judgment for \$600. The Dorchester avenue property was conveyed to the trustee bank, January 19, 1937, and there remained until February 17, 1938. While the title was in the bank the two judgments were obtained, the judgment for \$12,201.75 against Leonard, July 14, 1937, and the judgment for \$585.28 against Leonard and Mrs. Watson, November 10, 1937.

[given 2d. Date. Case. 106.12]
We hold their interest in the property was subject to the liens of the two judgments and the conveyance by the bank to Mrs. Easton February 17, 1938, did not affect such liens; that §49 of the Chancery act did not remove the lien from the beneficial interests of Leonard and Mrs. Watson. (Ill. Rev. Stat. 1939, ch. 22, §49.) Leonard and Mrs. Watson under the trust agreement were beneficial owners for life in the earnings, avails and proceeds derived from the property. City National Bank and Trust Company of

... Kyle suggested he see other counsel and shortly thereafter
Kyle and Leonard saw the new counsel, Mr. Kyle W. Leonard, and
took up the matter and after some negotiations with opposing counsel
prepared a supplemental report for receiver Leonard which showed
there was \$2501 due from the receiver. Shortly thereafter Leonard
discharged Rosetter but prior to that time it was suggested that
Kyle pay the equity of Leonard and other persons in the Rochester
avenue property. There were some negotiations and finally of
papers with this end in view. Kyle, apparently for this purpose,
borrowed \$2500 from Paul Gagers, but the matter fell through.
During these negotiations it appears that in clearing up the title
of the property the two judgments involved in this suit were dis-
closed and shortly after the matter of buying the property failed.
Kyle, on March 20, 1932, bought the Western Real Property interest
for \$100 and on the next day filed the instant suit to enforce the
payment of that judgment out of the Rochester avenue property. Four
days thereafter, Rose Shafter, who had ~~therefore~~ obtained a judgment
of more than \$15,000 against Leonard, intervened praying that she
be made a party plaintiff and shortly thereafter, April 15, 1932,
Kyle bought this judgment for \$500. The Rochester avenue property
was conveyed to the trustee bank, January 15, 1937, and there re-
mained until February 17, 1938. While the title was in the bank
the two judgments were obtained, the judgment for \$15,000 against
Leonard, April 15, 1937, and the judgment for \$100 against Leonard
and the Western Real Property, April 15, 1937.
... to hold their interest in the property was subject to the
liens of the two judgments and the conveyance by the bank to the
trustee February 17, 1938, did not affect such liens; that as of
the conveyance set did not remove the lien from the beneficial in-
terests of Leonard and the Western Real Property. (Ill. Rev. Stat., ch. 110,
§ 110-1) Leonard and the Western Real Property, which under the terms of the judgment were
beneficial interests for life in the earnings, assets and proceeds
of the property, were not subject to the lien of the judgment for \$100.

~~5~~ [Jones Ill. State. Bar. 104.022]

Defendants contend that since plaintiff Johnson was not the assignee and owner of the two judgments but that Joseph F. Kyle was, and since Joseph F. Kyle was not a party, the suit could not be maintained by Johnson because there was no compliance with § 22 of the Civil Practice act. (Ill. Rev. State, 1939, ch. 110, par. 122.) This contention cannot be sustained. Atkinson v. Foster, 134 Ill. 472, 477.

We think the finding of the commissioner and the chancellor to the effect that at the time Kyle obtained the assignment of the two judgments for \$700 there was a confidential relation existing between him, Leonard and Mrs. Watson is correct, and it is an elementary principle of equity that in such a situation Kyle, the agent, will not be permitted to make any profit in the buying of the two judgments. Escherichus v. Wagner, 383 Ill. 610.

Counsel for plaintiff contend the decree (by which defendants were required to pay \$700 to the plaintiff and Kyle, and that the two judgments be satisfied of record) is erroneous because defendants did not ask for such relief in their answers and they filed no counterclaim. We think the contention cannot be sustained. While the pleadings might have been in better form, we think they are sufficient and the decree ought not to be reversed where justice has been done "for the purpose of letting the parties raise in a more formal way an issue of which they have already had the benefit of a full trial." Lyons v. Renter, 285 Ill. 536. Leonard and Mrs. Watson in their answer, after setting up the facts in reference to the assignment of the judgment to Kyle, etc., say: "All such costs were done by Joseph F. Kyle and Kyle H. Roseller while acting in the fiduciary capacity of agent and attorney respectively and that the defendant Earl G. Leonard is entitled to an assignment of said judgment to these defendants."

By the decree defendants, Leonard and Mrs. Watson, were required to pay plaintiff Johnson \$700 for the use of Kyle and

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Caspere within sixty days and when this was done, the two judgments to be satisfied of record and it was decreed that the suit be dismissed. The decree should have provided that the \$700 was a lien on the interests of Leonard and Mrs. Watson in the Dorchester avenue property. The court retained jurisdiction to see that the payment of the \$700 was made and the judgment released. This was proper but the suit should not have been dismissed.

The decree of the Circuit court of Cook county is reversed and the cause remanded with directions to enter a decree in accordance with the views herein expressed, each party to pay his own costs in this court.

REVERSED AND REMANDED WITH DIRECTIONS.

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Matchett, J., and McGuirely, J., concur.
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41410

LOUIS PASECKY,

Appellee,

v.

APPEAL FROM

GUY A. RICHARDSON and WALTER J. CUMMINGS, as Receiver, etc., et al., doing business as CHICAGO SURFACE LINES,

CIRCUIT COURT,

COOK COUNTY.

Appellants.

309 I.A. 441

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendants to recover damages for personal injuries claimed to have been sustained while he was in the act of boarding one of defendants' northbound street cars on Western avenue at its intersection with Madison street, about 3:45 A.M., Christmas morning, December 25, 1937.

Plaintiff's contention is that while he was in the act of boarding the street car it started up, threw him to the ground and he was severely injured; while on the other side, defendants' position is that plaintiff, in attempting to board the car, slipped, fell and was injured while the car was standing. There was a jury trial, a verdict and judgment in plaintiff's favor for \$1500 and defendants appeal.

The only contention made by defendants is that the verdict and judgment are contrary to the manifest weight of the evidence.

Counsel for defendants in their brief say: "Plaintiff's theory is that he was the last of the waiting passengers to undertake to board the street car; that he placed his right foot on the first step and his right hand on the center bar; that as he raised his left foot to the platform, the car suddenly started and gave a violent jerk which threw him off balance" as a result of which both bones of plaintiff's left leg were fractured; that after he fell the car stopped within five or six feet. Counsel further say: "Defendants' theory is that as the car came to a stop, plaintiff was the first of the waiting passengers to undertake to board the street car; that he reached for the center grab handle but missed the first

LOUIS PASECKI,

Appellee,

JOHN A. RICHARDSON and ALBERT J. GUNTERMAN, as Respondents, etc., et al., doing business as CHICAGO WRECKING LINE,

CITY OF CHICAGO, ILLINOIS,

COOK COUNTY,

Special Term

CIRCUIT COURT,

MR. PRESIDING JUDGE O'CONNOR DELIVERED HIS OPINION OF THE COURT.

Plaintiff brought an action against defendants to recover damages for personal injuries claimed to have been sustained while he was in the act of boarding one of defendants' northbound street cars on Western Avenue at its intersection with Madison Street, about 8:45 A.M., Christmas morning, December 25, 1937.

Plaintiff's contention is that while he was in the act of boarding the street car it started up, threw him to the ground and he was severely injured; while on the other side, defendants' position is that plaintiff, in attempting to board the car, slipped, fell and was injured while the car was standing. There was a jury trial, a verdict and judgment in plaintiff's favor for \$1,500 and defendants appeal.

The only contention made by defendants is that the verdict and judgment are contrary to the manifest weight of the evidence. Counsel for defendants in their brief say: "Plaintiff's theory is that he was the last of the waiting passengers to make take to board the street car; that he placed his right foot on the first step and his right hand on the center bar; that as he raised his left foot to the platform, the car suddenly started and gave a violent jerk which threw him off balance" as a result of which both bones of plaintiff's left leg were fractured; that after he fell the car stopped within five or six feet. Counsel further say: "Defendants' theory is that as the car came to a stop, plaintiff was the first of the waiting passengers to undertake to board the street car; that he reached for the center grab handle and placed the first

step with his foot and slipped; that the street car was standing still and did not move until after the occurrence."

Plaintiff testified he was 39 years old, employed as a chef at Walter Powers' restaurant located at 3950 West Madison street where he had been so employed for about eight years; that December 24 he went to work about 4:30 in the afternoon and finished about 2:30 in the morning of December 25; that he then changed his clothes, took an eastbound Madison street car to go to his home at 2423 North Maplewood avenue (which is a few doors west of Western avenue and about three miles north of Madison street); that he rode on the street car to Western avenue where he alighted, walked to the east side of Western avenue south of Madison street to board a northbound street car which came along about 3:40 A.M.; that he had a box of candy under his left arm which had been given him by Mr. Powers as a Christmas present; that he was on the safety island as the northbound street car approached; that there were two or three men who got on the back platform ahead of him and he was the last one; that as he put his right foot on the first step and his right hand on the iron upright bar and raised his left foot to step up on the platform, the car suddenly started, gave a violent jerk and threw him; that the car went a few feet and stopped; that he felt his left leg was injured, limped back to the safety island and sat down when the conductor came over to see if he was injured; that in answer to a question he said: "I believe I broke my leg"; that he gave the conductor his name and address. Shortly thereafter the conductor got back on the street car and went on, and a few minutes later plaintiff hailed a taxicab and was taken to the Washington Boulevard Hospital which was a few blocks north and a few doors west of the place of the accident; that he was in the hospital about eleven weeks and did not return to work until May 2, 1938.

Dr. De Pree, called by plaintiff, testified he had treated plaintiff at the hospital and that "There is a spiral, oblique, comminuted fracture of the lower third of the tibia, the shin bone":

step with his foot and slipped; that the street car was standing

still and did not move until after the occurrence.

Plaintiff testified he was 39 years old, employed as a chef

at Walter Powers' restaurant located at 3350 West Madison Street

where he had been so employed for about eight years; that December

24 he went to work about 4:30 in the afternoon and finished about

2:50 in the morning of December 25; that he then changed his clothes,

took an eastbound Madison Street car to go to his home at 2425 North

Naplewood Avenue (which is a few doors west of Western Avenue and

about three miles north of Madison Street); that he rode on the street

car to Western Avenue where he alighted, walked to the east side of

Western Avenue south of Madison Street to board a northbound street

car which came along about 3:40 A.M.; that he had a box of candy

under his left arm which had been given him by Mr. Powers as a

Christmas present; that he was on the safety island at the northbound

street car approached; that there were two or three men who got on

the back platform ahead of him and he was the last one; that as he

put his right foot on the first step and his right hand on the iron

upright bar and raised his left foot to step up on the platform, the

car suddenly started, gave a violent jerk and threw him; that the

car went a few feet and stopped; that he felt his left leg was in-

jured, limped back to the safety island and sat down when the con-

ductor came over to see if he was injured; that in answer to a

question he said: "I believe I broke my leg"; that he gave the con-

ductor his name and address. Shortly thereafter the conductor got

back on the street car and went on, and a few minutes later plaintiff

hired a taxicab and was taken to the Washington Boulevard Hospital

which was a few blocks north and a few doors west of the place of the

accident; that he was in the hospital about eleven weeks and did not

return to work until May 2, 1932.

Dr. De Pres, called by plaintiff, testified he had treated

plaintiff at the hospital and that "There is a spinal, chronic, com-

that plaintiff was at the hospital 84 days and there was a shortage of about one-quarter inch of the left leg.

Frank Strunk, the conductor of the street car in question, called by defendants, testified he had worked as a street car conductor about 22 years and for some time prior to the accident he had a relief run and worked on a different car every night; that at the time and place in question the car was stopped just south of Madison street; there were about six or seven passengers standing on the safety island to board the car; that plaintiff "grabbed the handle and he kind of turned and missed the step"; that when the passengers all got on he walked back and talked to plaintiff who was then on the safety island, asked him his name so he could make a report and plaintiff said he was not hurt and was going to take a cab to go home; that he then got back on his car and proceeded. He further testified "Two or three people got on my car ahead of him, then he started to get on. *** They all got on the car before this fellow got hurt"; that the car was stopped. Further on in his direct examination he testified: "The fellow that claimed he was hurt, the plaintiff, was the first one that tried to get on."

Max Gorgos, who was about 20 years old at the time of the accident called by defendants, testified he was on the back platform of the car in question; that he lived south and was going north to a friend's house to attend a party; that he did not remember the address of his friend; that when plaintiff started to board the car "his left foot slipped off the step and he crouched down and I tried to assist him to get him on the street car, but he stood there, he got up right away and limped a few steps south of the street car"; that the car was standing still at the time; that five, six or seven other passengers boarded the car and plaintiff was the first; that none of the others got aboard the car before plaintiff attempted to do so.

The question (which counsel for defendants say is the con-

that plaintiff was at the hospital at 10:30 and there was a ambulance of about one-quarter inch of the left leg.

Frank Strunk, the conductor of the street car in question, called by defendant, testified he had worked as a street car conductor about 22 years and for some time prior to the accident he had a relief run and worked on a different car every night; that at

the time and place in question the car was stopped just south of Madison street; there were about six or seven passengers standing on the safety island to board the car; that plaintiff "grabbed the handle and he kind of turned and missed the step"; that when the passengers all got on he walked back and talked to plaintiff who was then on the safety island, asked him his name so he could make a report and plaintiff said he was not hurt and was going to take a cab to go home; that he then got back on his car and proceeded.

He further testified "Two or three people got on my car ahead of him, then he started to get on. *** They all got on the car before this fellow got hurt"; that the car was stopped, further on in his direct examination he testified: "The fellow that claimed he was hurt, the plaintiff, was the first one that tried to get on."

Sam Gorgoe, who was about 20 years old at the time of the accident called by defendant, testified he was on the back platform of the car in question; that he lived south and was going north to a friend's house to attend a party; that he did not remember the address of his friend; that when plaintiff started to board the car

"his left foot slipped off the step and he crumpled down and I tried to assist him to get him on the street car, but he stood there; he got up right away and limped a few steps north of the street car"; that the car was standing still at the time; that five, six or seven other passengers boarded the car and plaintiff was the first; that none of the others got aboard the car before plaintiff attempted to do so.

The question (which counsel for defendant says is the con-

trolling one was whether plaintiff attempted to board the car and while so doing it started forward causing him to fall, or whether the car was standing still at the time) was a typical question to be submitted to the jury. The jury found in favor of plaintiff, their action was approved by the trial judge and we are clear we would not be warranted in disturbing the verdict on the ground it is against the manifest weight of the evidence.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, J., and McSurely, J., concur.

travelling one was whether plaintiff attempted to board the car and while so doing it started forward carrying him to fall, or whether the car was standing still at the time) was a typical question to be submitted to the jury. The jury found in favor of plaintiff. Their action was approved by the trial judge and no error was would not be warranted in disturbing the verdict on the ground it is against the manifest weight of the evidence. The judgment of the circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McDonnell, J., and McQuay, J., concur.

41439

CLARK MEMORIAL MISSIONARY BAPTIST
CHURCH, INC., a Corporation,

Appellant,

v.

LIBERTY NATIONAL BANK OF CHICAGO,
etc., et al.,

Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY,

309 I.A. 441

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MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

May 14, 1940, plaintiff filed its complaint in chancery against the Liberty National Bank of Chicago, trustee under Trust No. 2844 and Harold Schelinski, to restrain them from attempting to evict plaintiff from the premises occupied by it for church purposes and to remove a deed as a cloud upon plaintiff's title. Defendants' motion to dismiss the complaint for want of equity was sustained, the suit dismissed and plaintiff appeals.

The question for decision is the sufficiency of the complaint and two amendments thereto. The substance of the allegations is that plaintiff is a religious corporation; that September 23, 1935, it "became a purchaser by a Memorandum Agreement executed and delivered to Plaintiff by one, Louis G. Snyder, who was the beneficial owner of" certain premises known as 4728-4730 South Forrestville avenue, Chicago. The memorandum agreement was attached to and made a part of the complaint and is as follows: "September 23, 1935. The Trustees of Clark Memorial Missionary Baptist Church received of church officers the sum of \$100.00 as earnest money and part of the down payment of \$500.00 for the purchase of property at 4728 Forrestville Ave. This property having been thoroughly inspected during the past three months, has been found satisfactory in all respects by the Rev. Clark and his committee.

"When the full payment of \$500.00 has been made, a contract for a Warranty Deed will be issued and all details of the conveyance of this property will be set forth.

(Signed) Louis G. Snyder."

of this property will be set forth.
"When the full payment of \$500.00 has been made, a contract for a warranty deed will be issued and all details of the conveyance

mitted.

found satisfactory in all respects by the Rev. Clark and his com-
been thoroughly inspected during the past three months, has been
case of property at 4780 Forestville Ave. This property having
earnest money and part of the down payment of \$500.00 for the pur-
Baptist Church received of church officers the sum of \$100.00 on
"September 23, 1935. The Trustees of Baptist Memorial Missionary
reached to and made a part of the complaint and is as follows:

Forestville Avenue, Chicago. The memorandum agreement was ex-
ficial owner of "certain premises known as 4780-4782 South

delivered to plaintiff by one, Louis E. Sawyer, who was the re-
1935, it "became a purchaser by a Memorandum Agreement executed and
is that plaintiff is a religious corporation; that September 23,
plaint and two amendments thereto. The substance of the allegations
The question for decision is the sufficiency of the com-

the suit dismissed and plaintiff appeals.

notion to dismiss the complaint for want of equity was sustained,
and to remove a deed as a cloud upon plaintiff's title. Defendants
evict plaintiff from the premises occupied by it for church purposes
No. 2844 and Harold Schellanski, to restrain them from attempting to
against the Liberty National Bank of Chicago, Trustee under Trust
May 14, 1940, plaintiff filed its complaint in Chancery

and the Justice of Common Delivered and Opinion of the Court.

LIBERTY NATIONAL BANK OF CHICAGO,
et al.,
CHURCH, INC., a corporation,
appellant,
vs.
LOUIS E. SAWYER,
defendant.

It is further alleged that plaintiff made the initial payment of \$100 and October 15, 1935, entered into possession of the real estate and has been in continuous occupancy of it since that time; that it made installment payments on the contract aggregating \$546; that the property was vacant and unimproved except there was a dilapidated garage building on the rear which plaintiff rehabilitated and which is now being occupied by plaintiff for its religious services.

It is further alleged that plaintiff made no payments "nor recognized any other grantor *** other than Louis G. Snyder" until his death April 12, 1935, after which time plaintiff made payments on account of said contract to his surviving widow, Cordelia Snyder; that November 9, 1939, Pauline Zilmer brought suit in forcible detainer in the Municipal court of Chicago against plaintiff to recover possession of the premises and afterward defendant, the Liberty National Bank of Chicago, as trustee under Trust No. 2844, was substituted as plaintiff in that action which was tried before a jury, and a directed verdict returned in favor of the church; that afterward the Liberty National Bank, as trustee, brought another action of forcible detainer in the Municipal court of Chicago against the church to recover possession of the premises, which action was tried before a jury who returned a verdict in favor of the trustee and against the church upon which judgment was entered; that the church was given no opportunity to argue a motion for a new trial and, more than five days after the entry of the judgment, the church made a motion to vacate the judgment, which was overruled, from which plaintiff prayed an appeal to this court which was granted. But the church was advised that the appeal was unavailing for the reason that it was taken more than five days after the judgment was entered in the forcible detainer case.

It is further alleged that the bank, as trustee, claims to have some interest in the premises but that such interest was acquired after the church had entered into the contract with Snyder

It is further alleged that plaintiff made the initial payment of \$100 and October 15, 1935, entered into possession of the real estate and has been in continuous occupancy of it since that time; that it made installment payments on the contract aggregating \$340; that the property was vacant and unimproved except there was a dilapidated garage building on the rear which plaintiff rehabilitated and which is now being occupied by plaintiff for its religious purposes.

It is further alleged that plaintiff made no payments "nor recognized any other grantor" other than Louis E. Snyder" until his death April 12, 1935, after which time plaintiff made payments on account of said contract to his surviving widow, Corbelia Snyder; that November 9, 1935, Pauline Elmer brought suit in Torpida for return in the Municipal Court of Chicago against plaintiff to recover possession of the premises and attorney defendant, the Liberty National Bank of Chicago, as trustee under Trust No. 2844, was appointed as plaintiff in that action which was tried before a jury, and a directed verdict returned in favor of the church; that afterward the Liberty National Bank, as trustee, brought another action of Torpida defendant in the Municipal Court of Chicago against the church to recover possession of the premises, which action was tried before a jury who returned a verdict in favor of the trustee and against the church upon which judgment was entered; that the church was given no opportunity to argue a motion for a new trial and, more than five days after the entry of the judgment, the church made a motion to vacate the judgment, which was overruled, from which plaintiff argued an appeal to this court which was granted. But the church was advised that the appeal was unavailable for the reason that it was taken more than five days after the judgment was entered in the Torpida defendant case.

It is further alleged that the Bank, as trustee, claims to have some interest in the premises but that such interest was not waived after the church had entered into the contract with Snyder.

and such interest was subordinate to that of the church; that the deed from Zilmer to the bank, as trustee, was a cloud upon plaintiff's title; that she had no right, interest or title to the property.

It is further alleged that plaintiff is "informed and does believe that Louis G. Snyder, plaintiff's grantor, conveyed the legal title in and to the said real estate" to the bank as trustee and that Snyder was the beneficial owner of the trust; that afterward the bank conveyed the title to Ed Neddo, subject to the trust, and that the conveyance by Zilmer to the bank "was in violation of the original Trust conveyance made by the said Louis G. Snyder"; that defendants threaten to sue out a writ of restitution for the eviction of plaintiff congregation from the premises and the prayer was that they be enjoined and the purported deed of conveyance from Zilmer to the bank be removed as a cloud on plaintiff's title.

The statement of claim, summons and defense filed in the forcible detainer suit brought by Zilmer against the church are attached to and made a part of the complaint, as is also a copy of the complaint and summons filed in the Municipal court of Chicago in the forcible detainer suit brought by the bank against defendant church. The affidavit of defense interposed to the Zilmer suit filed by the church set up as a defense the written document signed by Snyder September 25, 1935, above quoted, and it was then alleged that the church was an incorporated society in possession of the premises described in plaintiff's statement of claim; denied plaintiff was entitled to possession and averred that the church was occupying the premises by virtue of the claimed purchase from Snyder. The affidavit of defense, if any, which plaintiff filed in the suit brought by the bank, as trustee in forcible detainer, does not appear as one of the exhibits of the plaintiff but in the record several pages after the bill of complaint and exhibits, there appears what purports to be a copy of the defense interposed by the church in the forcible detainer suit brought by the bank, as

and such interest was subordinate to that of the church; that the deed from Elmer to the bank, as trustee, was a deed upon plaintiff's title; that she had no right, interest or title to the property. It is further alleged that plaintiff is "informed and does

believe that Louis G. Snyder, plaintiff's executor, conveyed the legal title in and to the said real estate" to the bank as trustee and that Snyder was the beneficial owner of the trust; that afterward the bank conveyed the title to Ed Webb, subject to the trust, and that the conveyance by Elmer to the bank "was in violation of the original trust conveyance made by the said Louis G. Snyder"; that

defendants threaten to sue out a writ of restitution for the eviction of plaintiff's congregation from the premises and the property was that they be enjoined and the requested deed of conveyance from Elmer to the bank be removed as a cloud on plaintiff's title.

The statement of claim, summons and defense filed in the forcible detainer suit brought by Elmer against the church are attached to and made a part of the complaint, as is also a copy of the complaint and summons filed in the Municipal Court of Chicago in the forcible detainer suit brought by the bank against defendant church. The affidavit of defense answered to the Elmer

suit filed by the church set up as a defense the written document signed by Snyder September 25, 1918, above quoted, and it was then alleged that the church was an incorporated society in possession of the premises described in plaintiff's statement of claim; denied

plaintiff was entitled to possession and averred that the church was occupying the premises by virtue of the claimed purchase from Snyder. The affidavit of defense, if any, which plaintiff filed in the suit brought by the bank, as trustee in forcible detainer, does not appear as one of the exhibits of the plaintiff but in the record several pages after the bill of complaint and exhibits.

There appears what purports to be a copy of the defense introduced by the church in the forcible detainer suit brought by the bank, as

trustee, in which is set up the trial and judgment entered in the Zilmer forcible detainer suit as being an adjudication of the matter.

May 16, 1940, plaintiff by leave of court, filed an amendment to its complaint by which it struck out a paragraph of its complaint and inserted another in lieu thereof, in which it was alleged that March 26, 1929, "Louis G. Snyder, plaintiff's grantor, conveyed the real estate herein described by Deed to the Peoples Nat'l Bank and Trust Co. of Chicago, as Trustee under Trust No. 6116"; that Snyder and his wife were the beneficial owners of the trust and that afterward the bank conveyed the property to Hollander, who in turn conveyed it by quitclaim deed to Ed Neddo. A number of other conveyances are alleged to have been made. That afterward Louis G. Snyder died leaving his widow surviving who sometime afterward also died and her estate was being probated in the Probate court of Cook county; that an inventory was filed in which the real estate in question was scheduled.

May 20, 1940, a second amendment to the complaint was filed naming Hollander, Neddo, Zilmer and the executor of Mrs. Snyder's estate, additional parties defendant, in which it was alleged these persons claimed to have some interest in the property but whose interest, if any, was subordinate to that of the plaintiff church. On the same day the court entered the order appealed from.

Whether the adjudication of the forcible detainer suit brought by Zilmer was res judicata of the matters involved in the subsequent detainer suit brought by the bank as trustee, we are unable to determine for the reason that there is no showing why the court directed a verdict in the first case nor the reason for the jury deciding in favor of the bank as trustee and against the church in the second forcible detainer case, and since there was no appeal from the judgment entered in the second suit we must assume the judgment in that case was properly entered.

We are further of opinion that the order appealed from was

trustee, in which is set up the trial and judgment entered in the
Kilmer forcible detainer suit as being an adjudication of the matter.
May 16, 1940, plaintiff by leave of court, filed an amend-
ment to its complaint by which it struck out a paragraph of its
complaint and inserted another in lieu thereof, in which it was al-
leged that March 25, 1939, "Louis G. Snyder, plaintiff's grantor,
conveyed the real estate herein described by deed to the Peoples
Nat'l Bank and Trust Co. of Chicago, as Trustee under Trust No.
5118"; that Snyder and his wife were the beneficial owners of the
trust and that afterward the bank conveyed the property to Hollander,
who in turn conveyed it by quitclaim deed to Ed Heide. A number of
other conveyances are alleged to have been made. That afterward
Louis G. Snyder died leaving his widow surviving who sometime after-
ward also died and her estate was being probated in the Probate
court of Cook county; that an inventory was filed in which the real
estate in question was scheduled.
May 20, 1940, a second amendment to the complaint was filed
naming Hollander, Heide, Kilmer and the executor of Mr. Snyder's
estate, additional parties defendant, in which it was alleged that
persons claimed to have some interest in the property but whose
interest, if any, was subordinate to that of the plaintiff's grantor.
On the same day the court entered the order appealed from.
Whether the adjudication of the forcible detainer suit
brought by Kilmer was res judicata of the matters involved in the
subsequent detainer suit brought by the bank as trustee, we are un-
able to determine for the reason that there is no showing why the
court directed a verdict in the first case nor the reason for the
jury deciding in favor of the bank as trustee and against the plaintiff
in the second forcible detainer case, and since there was no appeal
from the judgment entered in the second suit we must assume the
judgment in that case was properly entered.
We are further of opinion that the order appealed from was

proper and must be sustained for the reason that it is clear plaintiff did not have title to the premises and therefore could not maintain a suit to remove a cloud from the title. Town of Kaneville v. Meredith, 351 Ill. 620-626. In that case the court said: "A principle recognized in all the cases is, that unless a party shows title to land in himself it is not for him to complain that there is a cloud upon it. He must have a title to the land to give him a standing in a court before he can contest a cloud upon the title, whether it is created by an encumbrance or an adverse title."

In the instant case, plaintiff's claim to the property is based on the document signed by Louis G. Snyder September 23, 1935. That document states that the trustees of the church "received of church officers the sum of \$100.00 as earnest money and part of the down payment of \$500.00 for the purchase" of the property in question and ^{that} when the payment of the \$500.00 has been made "a contract for a Warranty Deed will be issued." This does not convey any interest in the property and the reference in a number of places in the complaint to Snyder as the church's "grantor" is unwarranted. The document signed by Snyder is wholly insufficient to warrant a decree in plaintiff's favor for the removal of a cloud from the property. Joseph v. Evans, 338 Ill. 11. That case was a suit in equity to remove clouds and quiet title to certain real estate. The court there said: "The alleged agreement was not clear and definite either as to the description or as to the quantum of estate to be conveyed. ***

"But appellee insists this is not a suit to compel specific performance but to quiet title. One of the necessary elements to sustain a bill to quiet title is that the complainant must be the owner, either legal or equitable, of the title sought to be quieted. *** Appellee admits he is not the legal owner - he merely claims equitable ownership. But he cannot be the equitable owner unless he can show a valid and enforceable agreement by Evans to convey. As we have pointed out, he has failed to do this."

proper and must be sustained for the reason that it is clear plain-
tiff did not have title to the premises and therefore could not
maintain a suit to remove a cloud from the title. State of Tennessee
v. Meredith, 251 Ill. 620-622. In that case the court said: "A
principle recognized in all the cases is, that unless a party shows
title to land in himself it is not for him to complain that there is
a cloud upon it. He must have a title to the land to give him a
standing in a court before he can contest a cloud upon the title,
whether it is created by an encumbrance or an adverse title."
In the instant case, plaintiff's claim to the property is
based on the document signed by Louis M. Snyder September 25, 1925.
That document states that the trustees of the church "received of
church officers the sum of \$100.00 as earnest money and part of the
down payment of \$500.00 for the purchase" of the property in
question and when the payment of the \$500.00 has been made, "a com-
tract for a warranty deed will be issued." This does not convey
any interest in the property and the reference in a number of places
in the complaint to Snyder as the church's "grantor" is unwarranted.
The document signed by Snyder is wholly insufficient to warrant a
decreed in plaintiff's favor for the removal of a cloud from the
property. Joseph v. Evans, 258 Ill. 11. That case was a suit in
equity to remove clouds and quiet title to certain real estate.
The court there said: "The alleged agreement was not clear and
definite either as to the description or as to the granting of
estate to be conveyed."
"But appellee insists that it is not a suit to compel specific
performance but to quiet title. One of the necessary elements of
maintaining a bill to quiet title is that the complainant must be the
owner, either legal or equitable, of the title sought to be quieted."
ed. Appellee admits he is not the legal owner - he claims
equitable ownership. But he cannot be the equitable owner
unless he can show a valid and enforceable agreement by which he

Plaintiff further contends the court erred in sustaining defendants' motion and dismissing the suit where the additional parties made defendants had not been served with process but we think there is no merit in this contention. The amendment to the complaint does not allege that the additional parties had any substantial interest in the premises and it is obvious the suit could not be maintained unless plaintiff were successful against the two defendants whose motion to dismiss was sustained.

The order of the Superior court of Cook county appealed from is affirmed.

ORDER AFFIRMED.

Matchett, J., and McSurely, J., concur.

The order of the Superior Court of Cook County appealing defendants whose motion to dismiss was sustained. Plaintiff does not allege that the additional parties had any substantial interest in the premises and it is obvious the suit could not be maintained unless Plaintiff were successful against the two parties made Defendant had not been served with process and no Defendant's motion and dismissing the suit where the additional Plaintiff further contains the court order in sustaining

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41513

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. Oscar Nelson, Auditor of
The State of Illinois,

v.

BINGA STATE BANK, a Corporation,

JOSEPH Z. WILLMER,

Appellant,

CHARLES H. ALBERS, Receiver of
Binga State Bank, a Corporation,
and WILLIAM J. WARFIELD,

Appellees.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

309 I.A. 442

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

December 12, 1939, Charles H. Albers, receiver of the Binga State Bank which was being liquidated, filed his verified petition in which he set up he held mortgage notes on which there was a balance due of \$10,000, secured by a trust deed on an apartment building in Chicago. That he had received an offer of \$5500 from William J. Warfield for the mortgage notes; that afterward Harry A. Blossat, on behalf of a client, offered \$7500; thereafter Warfield raised his offer to \$7700 and Blossat to \$7800; that he had submitted the last offer to the auditor of public accounts who recommended the acceptance of the offer; that afterward Warfield, November 29, 1939, offered \$8100 and the auditor had written a letter recommending the notes be sold. It was alleged that due notice be given all persons and that the court offer the asset in open court at public sale to the highest and best bidder for cash, but for not less than \$8100. Other facts were set up tending to show that in the opinion of the receiver and the auditor, it was advisable that the sale be made.

On the same day an order was entered, on motion of the receiver, which found the facts as set up in the petition; that the asset was offered at public sale, in open court, for cash; that Warfield had bid \$8100; that this was the highest and best bid re-

PEOPLE OF THE STATE OF ILLINOIS
vs. Oscar Nelson, Auditor of
the State of Illinois.

WILLIAM J. WENTFIELD, a corporation.

JOSEPH A. WILSON

CHARLES H. ALPERT, Receiver of
First State Bank, a Corporation,
and WILLIAM J. WENTFIELD,
Appellees.

3001 A. 444

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

December 12, 1932, Charles H. Alpert, receiver of the First
State Bank which was being liquidated, filed his verified petition
in which he set up he held mortgage notes on which there was a
balance due of \$10,000, secured by a trust deed on an apartment
building in Chicago. That he had received an offer of \$8000 from
William J. Wentfield for the mortgage notes; that afterwards Henry A.
Biosset, on behalf of a client, offered \$7500; thereafter Wentfield
raised his offer to \$7700 and Biosset to \$7800; that he had sub-
mitted the last offer to the auditor of public accounts who recom-
mended the acceptance of the offer; that afterwards Wentfield, November
29, 1932, offered \$8100 and the auditor had written a letter recom-
mending the notes be sold. It was alleged that due notice be given
all persons and that the court after the sale in open court a
public sale to the highest and best bidder for cash, but that the
other facts were set up tending to show that in the
opinion of the receiver and the auditor, it was advisable that the
sale be made.

On the same day an order was entered, on motion of the re-
ceiver, which found the facts as set up in the petition; that the
asset was offered at public sale, in open court, for cash; that
Wentfield had bid \$8100; that this was the highest and best bid for

ceived and it was ordered the sale be made to Warfield and the receiver was authorized to sign any and all necessary papers to carry out the sale.

About six months afterward, June 13, 1940, a notice, to which a copy of the petition was attached, was served by Joseph Z. Willner, an attorney, on the solicitor for the receiver, stating that on the next day he would appear before the chancellor and ask for an order in accordance with the prayer of the petition. The petition was filed the next day (June 14) but we are unable to find any order in the record allowing this to be done. The petition set up, among other things, the several offers made by Warfield and by Biossat for the asset (the same as had been theretofore set up in the petition of the receiver hereinabove referred to), the entry of the order authorizing the sale to Warfield for \$8100 cash, and averring the sale had not been completed because of the failure of Warfield to pay the amount of his bid; that the offer of \$7900 made by Biossat, was made by him on behalf of Willner; that he was now willing to increase his bid to \$8200 cash, and the prayer was that the order be entered to sell the asset to him for \$8200.

September 5, 1940, a report of the proceedings was filed, from which it appears that June 21, 1940, James B. Cashin appeared as counsel for Warfield, Joseph Willner, for himself, and Arnold Berger, for the receiver. Mr. Cashin, representing Warfield, stated to the court "this matter came up before your Honor last week and a stranger to the proceeding came in on the theory that he could make another bid.

"There has been an order entered some months ago. Colonel Warfield purchased these notes; he paid \$1000, and we were here last week; I think the Colonel was down at the legislature and your Honor put it over and said this week to have that money here. Now it has been paid last night. Your Honor, here is the receipt. It is all over with.

colored and it was ordered the sale be made to Carlisle and the receiver was authorized to sign any and all necessary papers to carry out the sale.

About six months afterwards, June 18, 1840, I received, to which a copy of the petition was attached, was served by Joseph A. Willner, an attorney, on the collector for the receiver, stating that on the next day he would appear before the chancellor and ask for an order in accordance with the terms of the petition. The petition was filed the next day (June 14) but we are unable to find any order in the record allowing this to be done. The petition set out, among other things, the several offers made by Carlisle and by himself for the asset (the same as had been theretofore set up in the petition of the receiver hereinabove referred to), the entry of the order authorizing the sale to Carlisle for \$1500 cash, and averring the sale had not been completed because of the failure of Carlisle to pay the amount of his bid; that the offer of \$1500 made by himself was made by him on behalf of Willner; that he was now willing to increase his bid to \$2500 cash, and the prayer was that the order be entered to sell the asset to him for \$2500.

September 8, 1840, a report of the proceedings was filed, from which it appears that June 21, 1840, James A. Graham appeared as counsel for Carlisle, Joseph Willner, for himself, and Francis Barker, for the receiver. Mr. Graham, representing Carlisle, stated to the court "this matter came up before your honor last week and a stranger to the proceeding came in on the theory that he could make

"There has been an order entered some months ago, whereby Carlisle purchased these assets; he paid \$1500, and we have been last week; I think the Colonel was down at the institution and your honor put it over and said this week to have that money here. Now it has been paid last night. Your honor, what is the result. It is all

"MR. WILLNER: It isn't either.

"THE COURT: Yes it is. ****"

Then followed some discussion between court and counsel as to authorities, including a reference to the "Ridgeway case," [287 Ill. App. 112.]

"MR. CASHIN: He has had his chance to bid, he didn't bid enough. We out-bid him." Objection was made by counsel for Warfield that Mr. Willner was a stranger to the case. The court inquired if his appearance was on file and Mr. Willner replied he had filed the petition June 14. "You gave me leave to file a petition and continued it until today." Mr. Willner then made a statement outlining what had been done, the bids made, etc., and continuing said: "The petition filed last week has an amended bid of \$8200, which was a bid of \$100 over their bid." He then stated he would offer \$8500. The court refused to hear the matter further and an order was entered. "This cause coming on to be heard upon the petition of Joseph Z. Willner heretofore filed in this cause and the Court having heard evidence and argument upon said petition,

"IT IS HEREBY ORDERED that the said petition be and the same is hereby denied." It is from this order that Willner prosecutes this appeal. The receiver has filed no brief in this court.

After the briefs were filed, counsel for Willner filed a motion in this court, which was reserved to the hearing, for a rule on Warfield to produce and file in this court "a photostatic copy of the receipt dated June 20, 1940, which was produced by the said appellee in court before Judge William V. Brothers on June 21, 1940, upon the call of this cause in said court and the original check to Charles H. Albers [the receiver] for payment of said bid." Although counsel says he tried to have this receipt and check made a part of the report of the proceedings of the trial, there is nothing in the record on this question. The motion is denied.

Counsel for Willner contends the sale of the asset December 12, 1939, to Warfield for \$8100 was for cash and since it was not

MR. WILLIAMS: It is filed.

THE COURT: Yes it is.

Then followed some discussion between counsel and the court to authorities, including a reference to the "Highway case," [1907]

111. App. 112.]

MR. CASHIN: He has had his chance to file, he didn't file

enough. We out-bid him. Objection was made by counsel for

Verfield that Mr. Willner was a stranger to the case. The court in-

quired if his appearance was on file and Mr. Willner replied he had

filed the petition June 14. "You gave me leave to file a petition

and continued it until today." Mr. Willner then made a statement

outlining what had been done, the bids made, etc., and continuing

said: "The petition filed last week has an amended bid of \$2500,

which was a bid of \$100 over their bid." He then stated he would

offer \$2500. The court refused to hear the matter further and an

order was entered. "This case coming on to be heard upon the pe-

tition of Joseph E. Willner heretofore filed in this cause and the

Court having heard evidence and argument upon said petition,

"IT IS HEREBY ORDERED that the said petition be and the same

is hereby denied." It is from this order that Willner's exceptions

this appeal. The receiver has filed no brief in this court.

That the briefs were filed, would the court please

motion in this court, which was reserved to the hearing, for a writ

on Verfield to produce and file in this court "a photostatic copy

of the receipt dated June 20, 1940, which was produced by the said

appellee in court before Judge William V. Roberts on June 21, 1940,

upon the call of this cause in said court and the original check to

Charles H. Albers [the receiver] for payment of said bid." Although

counsel says he failed to have this receipt and check made a part of

the report of the proceedings of the trial, there is nothing in the

record on this question. The motion is denied.

Counsel for Willner contends the sale of the great boggy

is, 1940, to Verfield for \$1000 was for cash and since it was not

made until more than six months thereafter (in fact counsel says it was not paid up to October, 1940) the court should have ordered the asset sold to him. The contention cannot be sustained. From the report of the proceedings had before the chancellor on the hearing of Willner's petition it appears that Warfield had paid \$1000 on account of the \$8100 some time prior to that date and had paid the balance the day before the hearing. A receipt was exhibited showing that the balance of the \$8100 had been paid. No contention was made at that time that this was not the fact. But Willner's position was that the asset, not having been paid until more than six months after the order authorizing it, the asset should be sold to him for \$8200.

Much reliance is placed by counsel for Willner on the Ridgeway case. [287 Ill. App. 112.] In that case an order had been entered authorizing the receiver to sell certain collateral for \$800 to Louis Jaffie but before the sale was consummated a bid of \$1350 was made to the receiver. Afterward Jaffie filed a petition seeking to compel the receiver to sell the property to him for \$800. This was resisted by the receiver and he was sustained.

In the case at bar, after notice to all parties and after Warfield and Blossat had made a number of bids and were familiar with the entire situation, the sale was made to Warfield for \$8100 in open court, this being the highest and best bid for cash. Afterward Warfield paid \$1000 and the day before the petition of Willner was heard, paid the balance. In the record before us we must presume the receiver has acted in the best interests of the creditors of the defunct bank.

The order of the Circuit court of Cook county is affirmed.

ORDER AFFIRMED.

Matchett, J., and McSurely, J., concur.

41524

HORTON CONRAD,

Appellee,

APPEAL FROM

v.

CIRCUIT COURT,

WRIGHT & COMPANY, a Corporation,
Appellant.

COOK COUNTY.

309 I.A. 442²

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover an amount claimed to be due him under the terms of a contract which plaintiff contended was partly oral and partly in writing, by the terms of which plaintiff was to be paid for selling coal for defendant. He prayed judgment for \$10,000. Defendant denied liability "except for proper commission on wholesale and carload sales between June 1, and December 16, 1937," the amount being ascertainable only after deductions of proper overhead and commission charges were made." There was a trial before the court without a jury, a finding and judgment in plaintiff's favor for \$1534.76, and defendant appeals.

On the trial and in this court defendant admits it owes plaintiff \$534.76 for commissions earned by him between June 1, and December 16, 1937, but that the judgment for the excess of \$1000 should be reversed. The record discloses that after some negotiations between plaintiff and Wright, president of defendant company, the parties, on May 18, 1937, entered into a written agreement in the form of a letter prepared and signed by defendant's counsel at its request, and addressed to plaintiff, whereby plaintiff, who had been selling coal for a number of years for other companies, was to go with defendant company. In the complaint and on the trial it was contended by plaintiff that the contract was partly in writing (the letter) and partly oral, while defendant's position was that the letter was the entire contract, and in this court it seems to be agreed that the letter constituted the entire contract between the

HORTON COMPANY,

Appellee,

v.

WRIGHT & COMPANY, a Corporation,
Appellant.

ALBANY, NEW YORK
CIRCUIT COURT
JANUARY TERM, 1937

809 I. A. 442

MR. PRESIDING JUSTICE O'CONNOR DELIVERING THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover an amount claimed to be due him under the terms of a contract which plaintiff contended was partly oral and partly in writing, by the terms of which plaintiff was to be paid for selling coal for defendant. He prayed judgment for \$10,000. Defendant denied liability except for proper commission on wholesale and certain sales between June 1, and December 18, 1937, the amount being ascertainable only after deductions of proper overhead and commission charges were made. There was a trial before the court without a jury, a finding and judgment in plaintiff's favor for \$1834.75, and defendant appealed.

On the trial and in this court defendant admitted it was plaintiff \$1834.75 for commissions earned by him between June 1, and December 18, 1937, but that the judgment for the excess of \$10,000 should be reversed. The record discloses that after some negotiations between plaintiff and Wright, president of defendant company, the parties, on May 18, 1937, entered into a written agreement in the form of a letter prepared and signed by defendant's counsel at its request, and addressed to plaintiff, whereby plaintiff, who has been selling coal for a number of years for other companies, was to go with defendant company. In the complaint and on the trial it was contended by plaintiff that the contract was partly in writing (the letter) and partly oral, while defendant's position was that the letter was the entire contract, and in this court it seems to be agreed that the letter constituted the entire contract between the

parties. By the terms of it plaintiff was to join defendant company as vice president, devote his full time, and particularly be in charge of the wholesale business. He was to commence work June 1, 1937. For making wholesale sales or carload lots plaintiff was to receive all of the net profits of such sales for the remainder of 1937, and thereafter one-half of the net profits after deducting certain expenses. The contract further provided plaintiff was to sell coal at retail for which he was to receive certain specified commissions per ton and further "In connection with the above retail sales you will be entitled to a drawing account of \$400 a month, the excess of the commissions payable on sales over the above drawing account to be payable at stated convenient periods."

As stated, plaintiff began work June 1, 1937 but the amount of his sales was unsatisfactory to defendant and May 14, 1938, defendant wrote plaintiff a letter advising him "that because of prevailing business conditions and the reduced income of Wright & Company, it is necessary to terminate your present contract with the company as of June 1, 1938." The letter was signed by Johnson, sales manager and later vice president, and stated it was written at the request of Mr. Wright, defendant's president. Plaintiff received the letter but refused to sever his connection, apparently on the ground that he had not seen Mr. Wright with whom he had made the contract, and continued on throughout the summer making a few sales, until October 13, 1938, when he wrote defendant a letter in which he said: "Your consistent refusal to pay me the amounts of compensation to which I am entitled and to carry out your other agreements with me leaves me no alternative but to consider that you have breached your agreements" and therefore he was forced to seek other employment and would take action to recover damages.

From June 1, 1937 to June 1, 1938, plaintiff received \$4799.75, and after June 1, \$900 on the monthly drawing account.

By the terms of its plaintiff was to join defendant company as vice president, devote his full time, and particularly be in charge of the wholesale business. He was to commence work June 1, 1937. For making wholesale sales on certain late plaintiff was to receive all of the net profits of such sales for the remainder of 1937, and thereafter one-half of the net profits after deducting certain expenses. The contract further provided plaintiff was to sell coal at retail for which he was to receive certain specified commissions per ton and further "In connection with the above retail sales you will be entitled to a drawing account of \$400 a month, the excess of the commissions payable on sales over the above drawing account to be payable at stated convenient periods."

As stated, plaintiff began work June 1, 1937 but the amount of his sales was unsatisfactory to defendant and May 14, 1938, defendant wrote plaintiff a letter advising him "that because of prevailing business conditions and the reduced income of Wright & Company, it is necessary to terminate your present contract with the company as of June 1, 1938." The letter was signed by Johnson, sales manager and later vice president, and stated it was written at the request of Mr. Wright, defendant's president. Plaintiff received the letter but refused to sever his connection, apparently on the ground that he had not seen Mr. Wright with whom he had made the contract, and continued on throughout the summer making a few sales, until October 13, 1938, when he wrote defendant a letter in which he said: "Your consistent refusal to pay me the amounts of compensation to which I am entitled and to carry out your other agreements with me leaves me no alternative but to consider that you have breached your agreements" and therefore he was forced to seek other employment and would take action to recover damages.

From June 1, 1937 to June 1, 1938, plaintiff received \$4789.75, and after June 1, \$600 on the monthly drawing account.

Counsel for defendant say that during the time plaintiff's "total commissions actually earned amounted to \$1,641.30. No claim is made by defendant of a right to charge back the excess to plaintiff, but the record speaks for itself as an explanation of why plaintiff was not and could not be appointed sales manager, or retained in employment." On the other hand, plaintiff's position is that throughout the time he was connected with defendant he received no cooperation from Mr. Johnson, the sales manager, or Mr. Hubbell, who for many years had been in charge of the buying; that defendant refused to comply with the requirements of the Guffy Coal act, turned down orders for coal which he had consummated and that this was the reason he did not sell more coal.

There is considerable testimony in the record of a number of witnesses who were called and recalled, a great part of which had substantially no bearing on the controversy between the parties. Some of this evidence tended to show that prior to entering into the contract in question plaintiff was employed by another coal company on a salary of \$600 a month and he gave up this contract^{to}/go with defendant company, while on the other side, that he was about to be relieved of his duties with the other company. There is also considerable evidence as to the amount of his sales with other companies over a period of years which throws little or no light on the question whether plaintiff was entitled to recover in the instant case.

The trial court held the employment of plaintiff by defendant could be terminated at any time by either party and that it had been so terminated June 1, 1938. The court in summing up the case said: "Now I feel that he is entitled to a finding here against the defendants, the defendant rather, for something in the neighborhood of the amount due him under the wholesale commissions, of some five hundred dollars net, \$534.00 I believe the figure is, and probably he might be entitled to something further, but anything substantial,

Counsel for defendant say that during the time plaintiff's "personal commissions actually earned amounted to \$1,241.50. No claim is made by defendant of a right to change back the excess to plaintiff, but the record speaks for itself as an explanation of why plaintiff was not and could not be appointed sales manager, or retained in employment." On the other hand, plaintiff's position is that throughout the time he was connected with defendant he received no co-operation from Mr. Johnson, the sales manager, or Mr. Whipple, who for many years had been in charge of the buying; that defendant refused to comply with the requirements of the duty deal set, turned down orders for coal which he had consummated and that this was the reason he did not sell more coal.

There is considerable testimony in the record of a number of witnesses who were called and recalled, a great part of which has substantially no bearing on the controversy between the parties. Some of this evidence tended to show that prior to entering into the contract in question plaintiff was employed by another coal company on a salary of \$500 a month and he gave up this contract ^{to} with defendant company, while on the other side, that he was about to be relieved of his duties with the other company. There is also considerable evidence as to the amount of his sales with other companies over a period of years which throws little or no light on the question whether plaintiff was entitled to recover in the instant case.

The trial court held the employment of plaintiff by defendant could be terminated at any time by either party and that it had been so terminated June 1, 1928. The court in summing up the case said: "Now I feel that he is entitled to a finding here against the defendants, the defendant rather, for something in the neighborhood of the amount due him under the wholesale commission, of some five hundred dollars net, \$584.00 I believe the figure is, and probably he might be entitled to something further, but anything substantial,

Mr. Newton, I don't feel would be justified under the evidence, as I reviewed it." The court then suggested that the parties see if a satisfactory figure could be arrived at and the case was continued. A few days later, nothing having been accomplished and the court being advised of this fact stated: "As I indicated last week, the court is of the opinion that the plaintiff should recover here the amount of commissions due him, as stipulated, \$534.76, and that he is also entitled to an amount in excess of that of approximately \$1,000, so I will enter a finding for the plaintiff against the defendant in the sum of \$1,534.76."

On the other side, counsel for plaintiff offered evidence as to dealings in an effort to sell coal to (1) Marshall Field & Co., (2) Freitag, (3) Goldblatt Bros., (4) Illinois Bell Telephone Co., and (5) Royal Management account, in an endeavor to make proof of the damages he sustained. He testified that prior to the contract in question he had sold coal to Marshall Field & Co., and felt certain he could retain that account; that he asked Wright what coal should be submitted to Field's and Wright suggested Sahara coal; that afterward he submitted this kind to Field's; that a test was made of the coal and it was found satisfactory and thereupon he reported to Mr. Wright but Wright told him that "unfortunately, they would not be able to buy sufficient tonnage from the Sahara people to supply that account," and that plaintiff "had to turn down a Marshall Field & Co. order because they did not have the coal to supply it." He further testified he sold Marshall Field & Co. 26,388 tons covering a period of one and one-half years prior to the time he joined defendant company; that the fair and reasonable commission under his written contract with defendant, which he was entitled to, was ten cents a ton and on this basis counsel for plaintiff say this item alone would more than substantiate the amount of the judgment.

Plaintiff was not interrogated either on direct or cross-

Mr. Newton, I don't feel would be justified under the evidence, as I reviewed it." The court then suggested that the parties see if a satisfactory figure could be arrived at and the case was continued. A few days later, nothing having been accomplished and the court being advised of this fact stated: "As I indicated last week, the court is of the opinion that the plaintiff should recover here the amount of commission due him, as stipulated, \$584.76, and that he is also entitled to an amount in excess of that of approximately \$1,000, so I will enter a finding for the plaintiff against the defendant in the sum of \$1,584.76."

On the other side, counsel for plaintiff offered evidence as to dealings in an effort to sell coal to (1) Marshall Field & Co., (2) ... (3) ... (4) ... and (5) Royal Management account, in an endeavor to make good on the damages he sustained. He testified that prior to the contract in question he had sold coal to Marshall Field & Co., and left certain he could retain that account; that he asked Wright what coal should be submitted to Field's and Wright suggested ... coal; that afterwards he submitted this kind to Field's; that a test was made of the coal and it was found satisfactory and thereupon he reported to Mr. Wright but Wright told him that "unfortunately, they would not be able to buy sufficient tonnage from the ... people to supply that account," and that plaintiff "had to turn down a Marshall Field & Co. order because they did not have the coal to supply it." He further testified he sold Marshall Field & Co. 26,338 tons covering a period of one and one-half years prior to the time he joined defendant company; that the fair and reasonable commission under his written contract with defendant, which he was entitled to, was ten cents a ton and on this basis counsel for plaintiff say this item alone would more than substantiate the amount of the judgment.

Plaintiff was not interrogated either on direct or cross-

examination with whom he negotiated concerning the Marshall Field & Co. matter nor what, if anything, that company agreed to pay per ton, nor how many tons were to be purchased. Mr. Wright was called by defendant and testified at considerable length, was recalled and re-examined but no question was asked him as to what was said between himself and plaintiff concerning the Marshall Field & Co. matter.

The only reply to the argument of counsel for plaintiff in reference to this coal is that Mr. Wright informed plaintiff they could not buy sufficient tonnage of the Sahara coal to take on the Field contract. We think this answer is insufficient. The uncontradicted evidence is that Wright, president of the company, was advised by plaintiff that he thought he could retain the Marshall Field & Co. business and at defendant's request submitted the Sahara coal which was tested by Field's, found satisfactory and accepted. Plaintiff having done this at the request of Mr. Wright, defendant's president, and having secured the order from Marshall Field & Co., we think defendant is not in a position now to say it could not fill the contract because it was not able to buy sufficient Sahara coal. We are of opinion defendant is liable for this item.

In this view of the case it is unnecessary to discuss what plaintiff did in reference to selling coal to the other parties above mentioned.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, J., and McSurely, J., concur.

examination with whom he negotiated concerning the Marshall Field & Co. matter nor what, if anything, that company agreed to pay for ton, nor how many tons were to be purchased. Mr. Wright was called by defendant and testified at considerable length, was recalled and re-examined but no question was asked him as to what was said between himself and plaintiff concerning the Marshall Field & Co. matter.

The only reply to the argument of counsel for plaintiff in reference to this coal is that Mr. Wright informed plaintiff they could not buy sufficient tonnage of the Kansas coal to take on the Field contract. We think this answer is insufficient. The answer contradicted evidence is that Wright, president of the company, was advised by plaintiff that he thought he could retain the Kansas Field & Co. business and at defendant's request submitted the Kansas coal which was tested by Field's, found satisfactory and accepted. Plaintiff having done this at the request of Mr. Wright, defendant's president, and having secured the order from Marshall Field & Co., we think defendant is not in a position now to say it could not fill the contract because it was not able to buy sufficient Kansas coal. We are of opinion defendant is liable for this item.

In this view of the case it is unnecessary to discuss what plaintiff did in reference to selling coal to the other parties above mentioned.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

ROBERTS, C. J., and HOLMES, J., concur.

41244

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JOSEPH TAUBER,

Appellee,

v.

HENRY BROWN,

Appellant.

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

309 I.A. 443

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Three respondents, Nadie Kirksey, Henry Brown and Madette Bryant, judges of election in the 58th precinct of the 4th Ward, Chicago, were found guilty of misbehavior at a city election held April 4, 1939. Brown was sentenced to be committed to the county jail of Cook county for a period of three years. Nadie Kirksey was sentenced to the county jail for one day, which was considered served by the time spent in court; she was also fined \$250, which was subsequently reduced to \$100. Madette Bryant was sentenced to be committed to the county jail for one day, which was considered served by the time spent in court; she was also fined \$500. Henry Brown alone appeals.

The gist of the charge against him is that he placed or permitted to be placed 52 ballots in the box in excess of the number of persons voting. He admits that this number of excess ballots were found but says he did not know how they got into the box.

Mrs. Kirksey testified that she was a judge at this election and arrived at the polling place at 5:45 in the morning; Brown was standing at the ballot box; she inquired whether the package of ballots had been opened and counted and was told by Brown that they had been counted; she asked him for the key to the box, opened it, and on examination found no ballots in the box; she then locked it and gave the key back to Brown, who stood by the box during the election giving out ballots. Mrs. Kirksey further testified that sometime during the day she went in a back room and saw there Mrs. Mattie Foster, one of the clerks, who showed her a list of typewritten names - about 50 of them - which Mrs. Foster said were handed to her by Brown to see if she would at various times make out ap-

PEOPLE OF THE STATE OF ILLINOIS
ex rel. JOSEPH TANNER

COUNTY COURT

COOK COUNTY

v.

KENNETH BROWN

IN JUDICIAL PROCEEDINGS RELATIVE TO THE ELECTION OF THE SENATE

These defendants, Madie Bryant, Henry Brown and Madie

Bryant, Judges of election in the 38th precinct of the 4th Ward, Chicago, were found guilty of misbehavior at a city election held April 4, 1932. Brown was sentenced to be committed to the county jail of Cook county for a period of three years. Madie Kirksey was sentenced to the county jail for one day, which was considered served by the time spent in court; she was also fined \$250, which was subsequently reduced to \$100. Madie Bryant was sentenced to be committed to the county jail for one day, which was considered served by the time spent in court; she was also fined \$500. Henry

Brown alone appeals.

The gist of the charge against him is that he placed or permitted to be placed 52 ballots in the box in excess of the number of persons voting. He admits that this number of excess ballots were found but says he did not know how they got into the box.

Mrs. Kirksey testified that she was a Judge at this election and arrived at the polling place at 8:45 in the morning; Brown was standing at the ballot box; she inquired whether the package of ballots had been opened and counted and was told by Brown that they had been counted; she asked him for the key to the box, opened it, and on examination found no ballots in the box; she then locked it and gave the key back to Brown, who stood by the box during the election giving out ballots. Mrs. Kirksey further testified that sometime during the day she went in a back room and saw there Mrs. Mattie Foster, one of the clerks, who showed her a list of type-written names - about 50 of them - which Mrs. Foster said were handed to her by Brown to see if she would at various times make out an-

plications for the people whose names were on the list. Mrs. Foster told Mrs. Kirksey she would not do it. Mrs. Kirksey testified that after her conversation with Mrs. Foster she called Mrs. Bryant's attention to this and told her to watch Brown. Mrs. Foster testified she had no conversation with Brown at any time during the day with reference to the applications for ballots.

Mrs. Bryant testified that there was some question as to whether Mrs. Kirksey or Brown should hand the ballots to the voters that day and Brown gave her to understand that he would do it; that Mrs. Kirksey wrote her a note asking her to watch Brown, which she did, but saw nothing wrong; that subsequently, in the election commissioners' office, she heard Mrs. Kirksey tell the commissioners or their representatives about the typewritten page with 52 names on it, for which Mrs. Foster had told her Brown had wanted the clerks at various times to sign applications. Mrs. Bryant says Mrs. Foster was present in the election commissioners' office and admitted in their presence Mrs. Kirksey's statement about the typewritten page of 52 names. Brown denied he gave Mrs. Foster a typewritten page with some 50 odd names and requested those handling applications to do anything.

All the judges and clerks testifying agreed that after the polls closed and the ballots were emptied from the box onto the table and counted they found 52 more ballots than there were voters at the election. There was considerable discussion as to what should be done with these excess ballots. Brown says he read from §10 of the General Election law. This provides that "If the ballots shall be found to exceed the number of names entered on each of the poll lists, they shall reject the ballots, if any, found folded inside of a ballot. And if the ballot and the poll lists still do not agree, they shall reject as many of the ballots as may be necessary to make the ballots agree in number with the names entered on each of the poll lists. The ballots shall be replaced in the box and the box closed and well shaken and again opened and one of the

applications for the people whose names were on the list. Mrs. Foster told Mrs. Kinney she would not do it. Mrs. Kinney testified that

after her conversation with Mrs. Foster she called Mrs. Bryant's attention to this and told her to watch Brown. Mrs. Foster testified she had no conversation with Brown at any time during the day with reference to the applications for ballots.

Mrs. Bryant testified that there was some question as to whether Mrs. Kinney or Brown should hand the ballots to the voters that day and Brown gave her to understand that he would do it; that Mrs. Kinney wrote her a note asking her to watch Brown, which she did, but saw nothing wrong; that independently, in the election commissioners' office, she heard Mrs. Kinney tell the commissioners that their representatives about the typewritten page with 32 names on it, for which Mrs. Foster had told her Brown had wanted the clerk at various times to sign applications. Mrs. Bryant says Mrs. Foster was present in the election commissioners' office and admitted in their presence Mrs. Kinney's statement about the typewritten page of 32 names. Brown denied he gave Mrs. Foster a typewritten page with some 30 odd names and requested those handling applications to do anything.

All the judges and clerks testifying agreed that after the polls closed and the ballots were emptied from the box onto the table and counted they found 32 more ballots than there were voters at the election. There was considerable discussion as to what should be done with these excess ballots. Brown says he read from §10 of the General Election Law. This provides that "if the ballots shall be found to exceed the number of names entered on each of the poll lists, they shall reject the ballots, if any, found folded in side of a ballot. And if the ballot and the poll lists still do not agree, they shall reject as many of the ballots as may be necessary to make the ballots agree in number with the names entered on each of the poll lists. The ballots shall be replaced in the box and the box closed and well shaken and again opened and one of the

judges shall publicly draw out and destroy as many ballots unopened as shall be equal to such excess and the ballots or poll lists agreeing or being made to agree in this way, the board shall proceed to count the votes in the following manner."

It is conceded the law was not strictly followed in that the ballots were not put back into the ballot box and well shaken. They were refolded and shuffled on the table. Brown drew out 52 ballots from those on the table, but there is a dispute as to what he did with them. He says they were torn and left on the table. Mrs. Kirksey says he picked up these excess ballots and put them behind a radiator. Mrs. Bryant said that when they found these extra ballots she inquired of Brown how they got into the box, and he said there was no need to discuss how they got in; that she got the book of rules and was trying to find what the rule said of such a situation; that Brown, after he withdrew the 52 extra ballots from the table, put them behind a radiator and she went over and got the ballots and put them back on the table.

Jennie Parker testified she was a Democratic precinct captain and was in the polling place when the discussion came up as to what should be done with the 52 excess ballots; that Brown first put these ballots behind the radiator but Mrs. Bryant got them and returned them to the table; that while Mrs. Bryant was looking up the rules Brown took the ballots off the table and took them back and placed them in a garbage can.

Respondent's brief first says that proof of guilt in these proceedings must be established beyond a reasonable doubt. It has been held to the contrary in People ex rel. Rusch v. Kotwas, 275 Ill. App. 406, where it was said that petitioner, to prove the guilt of respondents, was required to produce "most convincing evidence of the truth of the charge." Although Brown denies he placed the excess ballots behind the radiator and in a garbage can, yet the trial court, who saw the other witnesses, could believe their story as to what he did rather than to accept his denial.

Judges shall publicly draw out and destroy as many ballots unopened as shall be equal to such excess and the ballots or half lists appearing or being made to agree in this way, the board shall proceed to count the votes in the following manner."

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Jennie Parker testified she was a Democratic precinct captain and was in the polling place when the discussion came up as to what should be done with the 52 excess ballots; that Brown first put these ballots behind the radiator but Mrs. Bryant got them and returned them to the table; that while Mrs. Bryant was looking up the rules Brown took the ballots off the table and took them back and placed them in a garbage can.

Respondent's brief first says that proof of guilt in these proceedings must be established beyond a reasonable doubt. It has been held to the contrary in People ex rel. Busch v. Keweenaw, 275 Ill. App. 408, where it was said that petitioner, to prove the guilt of respondents, was required to produce "most convincing evidence of the truth of the charge." Although Brown denies he placed the excess ballots behind the radiator and in a garbage can, yet the trial court, who saw the other witnesses, could believe their story as to what he did rather than to accept his denial.

We are of the opinion that while it does not clearly appear how the excess ballots got into the ballot box, yet it does sufficiently appear that Brown, either through carelessness or purposely, permitted these illegal votes. Brown asserted his right to handle the ballots going into the box. Although it was denied, there was believable evidence that he gave Mrs. Foster a typewritten list of some 50 names, with the request that she make out applications for the persons whose names were on the list. This act was at variance with the faithful performance of his duties. When the excess ballots were found and Brown was asked how they got into the box he said there was no need to discuss how they got in. His endeavor to dispose of these excess ballots was suspicious.

Brown was a man of intelligence, having attended various schools in Chicago, worked for a time on certain papers, and works particularly in illustrating articles. He has lived in the precinct about five years and never been in trouble before.

The trial court imposed a sentence on him of imprisonment in the county jail for three years. While we are of the opinion that he deserves severe punishment, we hold the period of imprisonment is excessive. A penalty of one year in jail would be sufficient punishment for him.

For the reasons indicated the judgment is reversed and the cause remanded with directions to impose the penalty suggested.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P.J., and Matchett, J., concur.

we are of the opinion that while it does not clearly appear how the excess ballots got into the ballot box, yet it does not sufficiently appear that Brown, either through carelessness or purposely, permitted these illegal votes. Brown asserted his right to handle the ballots going into the box. Although it was denied, there was believable evidence that he gave Mrs. Foster a typewritten list of some 50 names, with the request that she make out applications for the persons whose names were on the list. This act was in violation with the faithful performance of his duties. When the excess ballots were found and Brown was asked how they got into the box he said there was no need to discuss how they got in. His endeavor to disprove of these excess ballots was unavailing.

Brown was a man of intelligence, having attended various schools in Chicago, worked for a time on certain papers, and works particularly in illustrating articles. He has lived in the precinct about five years and never been in trouble before.

The trial court imposed a sentence on him of imprisonment in the county jail for three years. While we are of the opinion that he deserves severe punishment, we hold the period of imprisonment is excessive. A penalty of one year in jail would be sufficient punishment for him.

For the reasons indicated the judgment is reversed and the cause remanded with directions to impose the penalty suggested.

REVEREND AND HONORABLE JUSTICES:

O'Connor, J., and Macintosh, J., concur.

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JOHN S. RUSCH,

Appellee,

v.

JOHN GARBACZ, THEODORE CHUDY and
ALBERT FEIGENBAUM,

Appellants.

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

309 I.A. 443²

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

The election officials were charged with misbehavior, under §13, Art. II of the City Election law (Ill. Rev. Stats. 1939, ch. 46, par. 186) in the performance of their duties as officers at the election held within the 38th precinct of the 25th Ward in Chicago on April 4, 1939; upon hearing by the county judge all of them were found guilty. John Garbacz, judge, Theodore Chudy and Albert Feigenbaum, clerks, were sentenced to two years imprisonment in the county jail; respondents, Anna Czech and Helen Bulat, judges, were sentenced to the county jail for one day, which was considered as served on account of the time spent in court on the trial.

Counsel for respondents first argue they were not given a fair trial in that the evidence was partially heard when three of the respondents were not represented by counsel. The record shows that the hearing was commenced January 23, 1940; after considerable preliminary talk, and testimony by Albert Feigenbaum, the hearing was continued to February 21, 1940; the respondents asked for a further continuance but the prosecution produced the testimony of ten witnesses who were ready, and after hearing their testimony the court continued the case for two days; Miss Cirese entered her appearance for the respondents February 23, and the case was continued to February 26, and again to February 28, at her request; she also requested a transcript of the testimony that had been heard in her absence and the court told her she could examine this, which she did. The record shows the trial was conducted fairly, and the fact that the court took part in asking questions does not support any charge of unfairness on his part.

PEOPLE OF THE STATE OF ILLINOIS,
 ex rel. JOHN B. HUSCH,
 Appellant,
 v.
 JOHN GARBARZ, THEODORE GUNDY and
 ALBERT FEIGENBAUM,
 Appellees.
 COUNTY COURT,
 COOK COUNTY,
 ILLINOIS.
 JUDGE: HENRY DELANEY
 1938

The election officials were charged with misbehavior, under §13, Art. II of the City Election Law (Ill. Rev. Stat. 1935, ch. 46, par. 186) in the performance of their duties as officers at the election held within the 38th precinct of the 23rd ward in Chicago on April 4, 1935; upon hearing by the county judge all of them were found guilty. John Garbarz, Judge, Theodore Gundy and Albert Feigenbaum, clerks, were sentenced to two years imprisonment in the county jail; respondents, Anna Czech and Helen Bulst, judges, were sentenced to the county jail for one day, which was considered as served on account of the time spent in court on the trial.

Counsel for respondents first argue they were not given a fair trial in that the evidence was partially heard when three of the respondents were not represented by counsel. The record shows that the hearing was commenced January 23, 1940; after considerable preliminary talk, and testimony by Albert Feigenbaum, the hearing was continued to February 21, 1940; the respondents asked for a further continuance but the prosecution produced the testimony of ten witnesses who were ready, and after hearing their testimony the court continued the case for two days; Miss Czech entered her appearance for the respondents February 23, and the case was continued to February 26, and again to February 28, at her request; she also requested a transcript of the testimony that had been heard in her absence and the court told her she could examine this, which she did. The record shows the trial was conducted fairly, and the fact that the court took part in asking questions does not support any charge of unfairness on his part.

On behalf of the prosecution 29 witnesses testified that although they were noted as having voted upon this occasion in this precinct, none of them had voted. Typical cases were where one witness was in California when the election was held, another was confined in a hospital, and another was out of town. All of these witnesses testified they did not sign an application for a ballot and did not vote.

Respondent John Garbacz gave no explanation as to how people were recorded as voting who had not appeared at the polling place. Theodore Chudy testified that no applications were issued to persons who did not sign before him, and denied he had acted at all as a judge but only as clerk at this election. Albert Feigenbaum could make no explanation as to these illegal votes. Respondent Anna Czech testified that for a time she initialed ballots and Feigenbaum, Chudy and Garbacz had charge of the tally sheets and called out the ballots after the polls were closed and the count was made. She said she knew none of the witnesses who testified that they had not voted. Respondent Helen Bulat testified that Feigenbaum initialed ballots while Garbacz and Chudy checked the applications. Katherine Keeler, an expert, testified that in her opinion 41 ballots bore cross marks in the Democratic circle made by the same person.

It is argued on behalf of the respondents that the evidence fails to disclose that any of them actually committed any of the wrong things with which they are charged. In People ex rel. Rusch v. Greenzeit, 277 Ill. App. 479, a similar argument was made. It was held that under §13, par. 267 (present par. 186), ch. 46 of the statutes, election officials may be punished for "misbehavior" in their office, and where the evidence shows gross carelessness in the performance of his duties the court has the power to punish an election official. Manifestly, in the present case where the record shows there were forged applications and ballots improperly marked, looking at the evidence in the light most favorable to respondents,

On behalf of the prosecution 38 witnesses testified that although they were noted as having voted upon this occasion in this precinct, none of them had voted. Typical cases were where one witness was in California when the election was held, another was confined in a hospital, and another was out of town. All of these witnesses testified they did not sign an application for a ballot and did not vote.

Respondent John Garbar gave no explanation as to how people were recorded as voting who had not appeared at the polling place. Theodore Chudy testified that no applications were issued to persons who did not sign before him, and denied he had acted as clerk as a judge but only as clerk at this election. Albert Teigenbaum could make no explanation as to these illegal votes. Respondent Anna Orzech testified that for a time she initialed ballots and Teigenbaum, Chudy and Garbar had charge of the tally sheets and called out the ballots after the polls were closed and the count was made. She said she knew none of the witnesses who testified that they had not voted. Respondent Helen Bulst testified that Teigenbaum initialed ballots while Garbar and Chudy checked the applications. Katherine Keeler, an expert, testified that in her opinion all ballots bore cross marks in the Democratic circle made by the same person.

It is argued on behalf of the respondents that the evidence fails to disclose that any of them actually committed any of the wrong things with which they are charged. In People ex rel. Chudy v. Greenblatt, 277 Ill. App. 479, a similar argument was made. It was held that under §12, par. 237 (present par. 106), Ch. 48 of the statutes, election officials may be punished for "misbehavior" in their office, and where the evidence shows gross carelessness in the performance of his duties the court has the power to punish an election official. Manifestly, in the present case where the record shows there were forged applications and ballots improperly marked, looking at the evidence in the light most favorable to respondents,

such things could have happened only through the gross carelessness of the election officials.

Complaint is made of the quarters for voting supplied by the election commissioners. In People ex rel. Rusch v. Levin, 305 Ill. App. 142, 153, it was held that failure to provide adequate polling places will not excuse frauds by the officials. It might be remarked that if the crowds were too great the police officer present could have prevented any overcrowding.

However, we are inclined to think the punishment meted out to the three appealing respondents of two years imprisonment in the county jail is excessive. As had been noted in People ex rel. Rusch v. Levin, supra, §11 of Art. II of the Constitution of Illinois provides that "All penalties shall be proportioned to the nature of the offense..."

It is claimed that respondents are young men of good character and with responsible positions, with no motive for misbehavior at this election. It also might be said in their favor that it is doubtful whether they would know, when a voter presented himself and asked for a ballot, giving a name of a registered voter, that he was not the person whom he represented himself to be. However, it is evident they were at least careless in the performance of their duties. Such a large number of illegal votes would not have been cast if they had been watchful. Such carelessness can not be excused by the plea that they had no knowledge that there were such irregularities. Under the circumstances a sentence of 90 days in the county jail for each of these appealing respondents would be sufficient punishment.

The judgments are reversed and the cause is remanded with directions to impose the penalty suggested.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P.J., and Matchett, J., concur.

such things could have happened only through the gross carelessness of the election officials.

Complaint is made of the quarters for voting supplied by the election commissioners. In People ex rel. Ruddy v. Leavin, 503 Ill. App. 142, 153, it was held that failure to provide adequate polling places will not excuse frauds by the officials. It might be remarked that if the crowds were too great the police officer present could have prevented any overcrowding.

However, we are inclined to think the punishment meted out to the three appealing respondents of two years imprisonment in the county jail is excessive. As has been noted in People ex rel. Ruddy v. Leavin, supra, §11 of Art. II of the Constitution of Illinois provides that "All penalties shall be proportioned to the nature of the offense."

It is claimed that respondents are young men of good character and with responsible positions, with no motive for misbehavior at this election. It also might be said in their favor that it is doubtful whether they would know, when a voter presented himself and asked for a ballot, giving a name of a registered voter, that he was not the person whom he represented himself to be. However, it is evident they were at least careless in the performance of their duties. Such a large number of illegal votes would not have been cast if they had been watchful. Such carelessness can not be excused by the plea that they had no knowledge that there were such irregularities. Under the circumstances a sentence of 10 days in the county jail for each of these appealing respondents would be sufficient punishment.

The judgments are reversed and the cause is remanded with directions to impose the penalty suggested.

REVEREND AND HONORABLE WITH DIGNITY,
O'Connor, F.L., and McChesney, J., concur.

41385

LOUIS LIEBERMAN,

Appellee,

APPEAL FROM

v.

MUNICIPAL COURT

AARON E. KANTER and ELEANOR KANTER,
Appellants.

OF CHICAGO.

309 I.A. 444

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff, owner of certain real estate bonds, part of a larger issue, caused judgment by confession to be entered against defendants (makers of the bonds) in the Municipal Court of Chicago on April 26, 1939, for \$1595, the amount due. March 23, 1940, defendants filed a verified petition in support of their motion to set aside and vacate the judgment. April 4, 1940, an order was entered reducing the judgment to \$921.92. Defendants appeal.

The facts disclosed by the petition are that plaintiff's bonds were part of an issue secured by trust deed on real estate in Cook county. After the entry of the judgment April 26, 1939, the legal owners of a majority of the unpaid bonds requested the trustee to foreclose. He did so, obtained a decree and sale of the premises and distribution of the proceeds to the unpaid bondholders, including plaintiff, who accepted his pro rata share. There was a deficiency of about fifty cents on the dollar for which a decree was entered in favor of the legal owners and holders of the bonds. The trustee is in possession of the premises pending the period of redemption and has distributed to plaintiff his pro rata share. Defendants claim that by accepting the benefits of the foreclosure, plaintiff is bound by the decree and the judgment he obtained is merged in it.

The petition did not comply with the rules of the Supreme court as to setting aside judgments. (See Supreme Court Rule 15, Smith-Murd Anno. Stats. ch. 110, §259.15, p. 523; Supreme Court Rule 26, ch. 110, §259.26, p. 562.) There are several reasons why the pleading is insufficient. It shows laches on its face. The judg^{ment}

The petition did not comply with the rules of the court as to setting aside judgments. (See Supreme Court Rule 16, Smith-Hurd Anno. Stat., ch. 110, § 839.10, p. 841; Southern County v. Smith-Hurd Anno. Stat., ch. 110, § 839.10, p. 841.) There are several reasons why the pleading is insufficient. It shows lack of due diligence.

was entered April 26, 1939; the petition to vacate March 25, 1940. There is no statement of facts to excuse the apparent laches. Kesner v. Truax, 195 Ill. App. 285; Freeman v. Counsell, 203 Ill. App. 333; Sternberger v. Wright, 239 Ill. App. 490. There is no statement of facts tending to show a defense in whole or in part. Upon default in payment plaintiff had a right to bring an action at law to recover judgment. Rohrer v. Deatherage, 336 Ill. 450. He had a right to pursue his remedy at law and in equity concurrently. In re: Estate of Whipple, 285 Ill. App. 491; Lawn View Bldg. Corp. v. Weinstock, 288 Ill. App. 320; Washingtonian Home v. Van Meter, 297 Ill. App. 591.

The Supreme court has held that even a provision in a trust deed to the effect that the right to sue at law or in equity on such securities is vested exclusively in the trustee does not change this rule as to the right of the owner. Plaintiff is, of course, entitled to only one satisfaction. Defendants cite Wayman v. Cochrane, 35 Ill. 151; Lightcap v. Bradley, 186 Ill. 510; Skolnik v. Patella, 304 Ill. App. 531, and other cases, all of which declare the general rule that when an action is brought on a note, bond or similar instrument, and judgment or decree recovered thereon, the instrument is merged in the judgment. These cases are all distinguishable. The defendants were, of course, entitled to have the judgment satisfied to the extent that payment had been made to plaintiff. The trial court in effect granted this by reducing the amount of the judgment. Thereby justice was attained in substance, and this is the important thing. Doerr v. Schmitt, 375 Ill. 470.

The judgment will be affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and McSurely, J., concur.

was entered April 28, 1932; the petition to vacate March 28, 1932.
There is no statement of facts to excuse the apparent lack of
v. Trax, 102 Ill. App. 288; Trax v. Connell, 202 Ill. App. 287;
Stemberger v. Wright, 232 Ill. App. 430. There is no statement of
facts tending to show a defense in whole or in part. Upon review of
payment plaintiff had a right to bring an action at law to recover
judgment. Kahner v. Deffenhard, 232 Ill. 480. He had a right to
pursue his remedy at law and in equity concurrently. In re: Relief
of Whiggle, 232 Ill. App. 481; Lawn View High Corp. v. Reinhold,
232 Ill. App. 320; Washington Home v. Van Meter, 232 Ill. App. 321.
The Supreme court has held that even a provision in a trust
deed to the effect that the right to sue at law or in equity on such
securities is vested exclusively in the trustee does not change this
rule as to the right of the owner. Plaintiff is, of course, entitled
to only one satisfaction. Defendants cite Wayman v. Bourneau, 28
Ill. 181; Lichtow v. Bradley, 182 Ill. 310; Klein v. Felsch, 204
Ill. App. 351, and other cases, all of which declare the general
rule that when an action is brought on a note, bond or similar in-
strument, and judgment or decree recovered thereon, the instrument is
merged in the judgment. These cases are all distinguishable. The
defendants were, of course, entitled to have the judgment satisfied
to the extent that payment had been made to plaintiff. The writ
court in effect granted this by reducing the amount of the judgment.
Thereby justice was obtained in substance, and this is the intention.
Doer v. Schmitt, 375 Ill. 470.
The judgment will be affirmed.

O'Donnell, J., and McDevitt, J., concur.

41405

AUTOMATIC OIL HEATING COMPANY,
a Corporation,

Appellee,

v.

FRED B. LEE and CORDELIA LEE,
Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

309 I.A. 444²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a judgment on the finding of the court that a former judgment by confession for \$684.47 stand confirmed. The case was before this court on a former appeal by defendants from an order denying their motion to open up the judgment by confession. We reversed the order and remanded with directions to try the case upon the merits. (296 Ill. App. 628.)

The suit is based on an undated note for \$587.85, payable in monthly installments of \$16.20 each with interest at the rate of 6% per annum. The consideration for the note was the balance said to be due on a written contract of March 10, 1937, whereby plaintiff sold and agreed to install in defendants' premises an oil heating equipment consisting of a "Timken Silent Automatic Burner" complete with controls and thermostat at the price of \$317; an above ground tank for \$155; an automatic electric pump for \$66, to which a service charge of \$76.85 was added. Defendants paid in cash \$25 and executed their note for the balance.

The building of defendants was a two-story building situated at 4923 Michigan avenue in Chicago. It contained 22 rooms. Defendants lived in it and conducted a rooming house business there. The building had been heated by steam and the boiler was fired by the use of coal. This method produced sufficient heat, but it seems to have been the thought of the purchasers that by substituting oil for coal the cost of janitor's service might be lessened.

Plaintiff was in the business of selling equipment for heating by the use of oil. Moore was president, Lyons was salesman,

AUTOMATIC OIL HEATING COMPANY,
 a Corporation,
 v.
 EDWARD B. LEE and
 LUCILLE L. LEE
 DEFENDANTS
 CHICAGO, ILL.
 3091 A. 444
 MR. JUSTICE MONTAGUE DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a judgment on the finding of the court that a former judgment by confession for \$394.44 stand confirmed. The case was before this court on a former appeal by defendants from an order denying their motion to open up the judgment by confession. We reversed the order and remanded with directions to try the case upon the merits. (299 Ill. App. 529.)

The suit is based on an unpaid note for \$397.50, payable in monthly installments of \$10.90 each with interest at the rate of 8% per annum. The consideration for the note was the balance due to be due on a written contract of March 10, 1937, whereby plaintiff sold and agreed to install in defendants' premises an oil heating equipment consisting of a "Timken Silent Automatic Burner" complete with controls and thermostat at the price of \$217, an above ground tank for \$185; an automatic electric pump for \$20, to which a service charge of \$75.85 was added. Defendants paid in cash \$25 and executed their note for the balance.

The building of defendants was a two-story building situated at 4933 Michigan Avenue in Chicago. It contained 22 rooms. Defendants lived in it and conducted a rooming house business there. The building had been heated by steam and the boiler was fired by the use of coal. This method produced sufficient heat, but it seems to have been the thought of the purchasers that by substituting oil for coal the cost of heating a service might be lessened.

Plaintiff was in the business of selling equipment for heating by the use of oil. Moore was president, Lyons was salesman,

engineer and expert in the matter of heating equipment, and Davidson was the service manager of the plaintiff corporation. Lyons obtained the contract March 10, 1937. Moore approved it March 13. The equipment was installed in defendants' building March 19. Lyons with Mrs. Lee made an inspection of the premises at about the time the contract was signed "to see if the boiler was sufficient size and everything connected with it." Lyons was present when the equipment was installed and talked with both defendants, told them how to adjust the radiators, where to place the tank and other parts of the equipment. He did not stay until the installation of the equipment was complete. He inspected the work afterwards, returning four or five times. He had estimated for defendants that the consumption of oil would be about \$50 per month. The contract guaranteed the burner to be capable of supplying heat up to the normal heating capacity of the boiler or furnace. There was, of course, an implied warranty that the equipment would be reasonably fit for the purpose for which it was purchased, that is, that it would heat the building. (Smith-Murd Anno. Stats., ch. 121-1/2, §15, p. 477.)

The sole defense interposed in the affidavit of merits was that the equipment did not comply with either the guaranty of the contract or the warranty implied by law in that it was incapable of furnishing sufficient heat. The undisputed evidence is that between March 19, and May 15, 1937, defendants burned 1200 gallons of oil which cost \$86.52, a little less than the amount estimated. The amount of oil used would depend very much upon the amount of heat desired and the manner in which the equipment was operated. Defendants do not argue that there was any failure of warranty in respect to the amount of oil consumed.

Plaintiff contends (and the evidence submitted by it tends to show) that this was the only matter which defendants complained of and the only reason given by them for repudiating the contract, which they did, notifying plaintiff that the equipment had been taken out and was held for plaintiff. In view of the sharp conflict

engineer and expert in the matter of heating equipment, and testimony was the service manager of the plaintiff corporation. These witnesses

the contract March 10, 1937. Moore approved it March 12, 1937. The equipment was installed in defendant's building March 15, 1937.

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and everything connected with it." Lyons was present when the equipment was installed and talked with both defendants, told them

how to adjust the radiators, where to place the tank and other parts of the equipment. He did not stay until the installation of the

equipment was complete. He inspected the work afterwards, returning four or five times. He had estimated for defendant that the con-

sumption of oil would be about \$50 per month. The contract provided that the burner to be capable of supplying heat up to the normal

heating capacity of the boiler or furnace. There was, of course, an implied warranty that the equipment would be reasonably fit for the

purpose for which it was purchased, that is, that it would heat the building. (Exhibit 1, pp. 1-10, 11-12, 13-14, 15-16, 17-18, 19-20, 21-22, 23-24, 25-26, 27-28, 29-30, 31-32, 33-34, 35-36, 37-38, 39-40, 41-42, 43-44, 45-46, 47-48, 49-50, 51-52, 53-54, 55-56, 57-58, 59-60, 61-62, 63-64, 65-66, 67-68, 69-70, 71-72, 73-74, 75-76, 77-78, 79-80, 81-82, 83-84, 85-86, 87-88, 89-90, 91-92, 93-94, 95-96, 97-98, 99-100, 101-102, 103-104, 105-106, 107-108, 109-110, 111-112, 113-114, 115-116, 117-118, 119-120, 121-122, 123-124, 125-126, 127-128, 129-130, 131-132, 133-134, 135-136, 137-138, 139-140, 141-142, 143-144, 145-146, 147-148, 149-150, 151-152, 153-154, 155-156, 157-158, 159-160, 161-162, 163-164, 165-166, 167-168, 169-170, 171-172, 173-174, 175-176, 177-178, 179-180, 181-182, 183-184, 185-186, 187-188, 189-190, 191-192, 193-194, 195-196, 197-198, 199-200, 201-202, 203-204, 205-206, 207-208, 209-210, 211-212, 213-214, 215-216, 217-218, 219-220, 221-222, 223-224, 225-226, 227-228, 229-230, 231-232, 233-234, 235-236, 237-238, 239-240, 241-242, 243-244, 245-246, 247-248, 249-250, 251-252, 253-254, 255-256, 257-258, 259-260, 261-262, 263-264, 265-266, 267-268, 269-270, 271-272, 273-274, 275-276, 277-278, 279-280, 281-282, 283-284, 285-286, 287-288, 289-290, 291-292, 293-294, 295-296, 297-298, 299-300, 301-302, 303-304, 305-306, 307-308, 309-310, 311-312, 313-314, 315-316, 317-318, 319-320, 321-322, 323-324, 325-326, 327-328, 329-330, 331-332, 333-334, 335-336, 337-338, 339-340, 341-342, 343-344, 345-346, 347-348, 349-350, 351-352, 353-354, 355-356, 357-358, 359-360, 361-362, 363-364, 365-366, 367-368, 369-370, 371-372, 373-374, 375-376, 377-378, 379-380, 381-382, 383-384, 385-386, 387-388, 389-390, 391-392, 393-394, 395-396, 397-398, 399-400, 401-402, 403-404, 405-406, 407-408, 409-410, 411-412, 413-414, 415-416, 417-418, 419-420, 421-422, 423-424, 425-426, 427-428, 429-430, 431-432, 433-434, 435-436, 437-438, 439-440, 441-442, 443-444, 445-446, 447-448, 449-450, 451-452, 453-454, 455-456, 457-458, 459-460, 461-462, 463-464, 465-466, 467-468, 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691-692, 693-694, 695-696, 697-698, 699-700, 701-702, 703-704, 705-706, 707-708, 709-710, 711-712, 713-714, 715-716, 717-718, 719-720, 721-722, 723-724, 725-726, 727-728, 729-730, 731-732, 733-734, 735-736, 737-738, 739-740, 741-742, 743-744, 745-746, 747-748, 749-750, 751-752, 753-754, 755-756, 757-758, 759-760, 761-762, 763-764, 765-766, 767-768, 769-770, 771-772, 773-774, 775-776, 777-778, 779-780, 781-782, 783-784, 785-786, 787-788, 789-790, 791-792, 793-794, 795-796, 797-798, 799-800, 801-802, 803-804, 805-806, 807-808, 809-810, 811-812, 813-814, 815-816, 817-818, 819-820, 821-822, 823-824, 825-826, 827-828, 829-830, 831-832, 833-834, 835-836, 837-838, 839-840, 841-842, 843-844, 845-846, 847-848, 849-850, 851-852, 853-854, 855-856, 857-858, 859-860, 861-862, 863-864, 865-866, 867-868, 869-870, 871-872, 873-874, 875-876, 877-878, 879-880, 881-882, 883-884, 885-886, 887-888, 889-890, 891-892, 893-894, 895-896, 897-898, 899-900, 901-902, 903-904, 905-906, 907-908, 909-910, 911-912, 913-914, 915-916, 917-918, 919-920, 921-922, 923-924, 925-926, 927-928, 929-930, 931-932, 933-934, 935-936, 937-938, 939-940, 941-942, 943-944, 945-946, 947-948, 949-950, 951-952, 953-954, 955-956, 957-958, 959-960, 961-962, 963-964, 965-966, 967-968, 969-970, 971-972, 973-974, 975-976, 977-978, 979-980, 981-982, 983-984, 985-986, 987-988, 989-990, 991-992, 993-994, 995-996, 997-998, 999-1000, 1001-1002, 1003-1004, 1005-1006, 1007-1008, 1009-1010, 1011-1012, 1013-1014, 1015-1016, 1017-1018, 1019-1020, 1021-1022, 1023-1024, 1025-1026, 1027-1028, 1029-1030, 1031-1032, 1033-1034, 1035-1036, 1037-1038, 1039-1040, 1041-1042, 1043-1044, 1045-1046, 1047-1048, 1049-1050, 1051-1052, 1053-1054, 1055-1056, 1057-1058, 1059-1060, 1061-1062, 1063-1064, 1065-1066, 1067-1068, 1069-1070, 1071-1072, 1073-1074, 1075-1076, 1077-1078, 1079-1080, 1081-1082, 1083-1084, 1085-1086, 1087-1088, 1089-1090, 1091-1092, 1093-1094, 1095-1096, 1097-1098, 1099-1100, 1101-1102, 1103-1104, 1105-1106, 1107-1108, 1109-1110, 1111-1112, 1113-1114, 1115-1116, 1117-1118, 1119-1120, 1121-1122, 1123-1124, 1125-1126, 1127-1128, 1129-1130, 1131-1132, 1133-1134, 1135-1136, 1137-1138, 1139-1140, 1141-1142, 1143-1144, 1145-1146, 1147-1148, 1149-1150, 1151-1152, 1153-1154, 1155-1156, 1157-1158, 1159-1160, 1161-1162, 1163-1164, 1165-1166, 1167-1168, 1169-1170, 1171-1172, 1173-1174, 1175-1176, 1177-1178, 1179-1180, 1181-1182, 1183-1184, 1185-1186, 1187-1188, 1189-1190, 1191-1192, 1193-1194, 1195-1196, 1197-1198, 1199-1200, 1201-1202, 1203-1204, 1205-1206, 1207-1208, 1209-1210, 1211-1212, 1213-1214, 1215-1216, 1217-1218, 1219-1220, 1221-1222, 1223-1224, 1225-1226, 1227-1228, 1229-1230, 1231-1232, 1233-1234, 1235-1236, 1237-1238, 1239-1240, 1241-1242, 1243-1244, 1245-1246, 1247-1248, 1249-1250, 1251-1252, 1253-1254, 1255-1256, 1257-1258, 1259-1260, 1261-1262, 1263-1264, 1265-1266, 1267-1268, 1269-1270, 1271-1272, 1273-1274, 1275-1276, 1277-1278, 1279-1280, 1281-1282, 1283-1284, 1285-1286, 1287-1288, 1289-1290, 1291-1292, 1293-1294, 1295-1296, 1297-1298, 1299-1300, 1301-1302, 1303-1304, 1305-1306, 1307-1308, 1309-1310, 1311-1312, 1313-1314, 1315-1316, 1317-1318, 1319-1320, 1321-1322, 1323-1324, 1325-1326, 1327-1328, 1329-1330, 1331-1332, 1333-1334, 1335-1336, 1337-1338, 1339-1340, 1341-1342, 1343-1344, 1345-1346, 1347-1348, 1349-1350, 1351-1352, 1353-1354, 1355-1356, 1357-1358, 1359-1360, 1361-1362, 1363-1364, 1365-1366, 1367-1368, 1369-1370, 1371-1372, 1373-1374, 1375-1376, 1377-1378, 1379-1380, 1381-1382, 1383-1384, 1385-1386, 1387-1388, 1389-1390, 1391-1392, 1393-1394, 1395-1396, 1397-1398, 1399-1400, 1401-1402, 1403-1404, 1405-1406, 1407-1408, 1409-1410, 1411-1412, 1413-1414, 1415-1416, 1417-1418, 1419-1420, 1421-1422, 1423-1424, 1425-1426, 1427-1428, 1429-1430, 1431-1432, 1433-1434, 1435-1436, 1437-1438, 1439-1440, 1441-1442, 1443-1444, 1445-1446, 1447-1448, 1449-1450, 1451-1452, 1453-1454, 1455-1456, 1457-1458, 1459-1460, 1461-1462, 1463-1464, 1465-1466, 1467-1468, 1469-1470, 1471-1472, 1473-1474, 1475-1476, 1477-1478, 1479-1480, 1481-1482, 1483-1484, 1485-1486, 1487-1488, 1489-1490, 1491-1492, 1493-1494, 1495-1496, 1497-1498, 1499-1500, 1501-1502, 1503-1504, 1505-1506, 1507-1508, 1509-1510, 1511-1512, 1513-1514, 1515-1516, 1517-1518, 1519-1520, 1521-1522, 1523-1524, 1525-1526, 1527-1528, 1529-1530, 1531-1532, 1533-1534, 1535-1536, 1537-1538, 1539-1540, 1541-1542, 1543-1544, 1545-1546, 1547-1548, 1549-1550, 1551-1552, 1553-1554, 1555-1556, 1557-1558, 1559-1560, 1561-1562, 1563-1564, 1565-1566, 1567-1568, 1569-1570, 1571-1572, 1573-1574, 1575-1576, 1577-1578, 1579-1580, 1581-1582, 1583-1584, 1585-1586, 1587-1588, 1589-1590, 1591-1592, 1593-1594, 1595-1596, 1597-1598, 1599-1600, 1601-1602, 1603-1604, 1605-1606, 1607-1608, 1609-1610, 1611-1612, 1613-1614, 1615-1616, 1617-1618, 1619-1620, 1621-1622, 1623-1624, 1625-1626, 1627-1628, 1629-1630, 1631-1632, 1633-1634, 1635-1636, 1637-1638, 1639-1640, 1641-1642, 1643-1644, 1645-1646, 1647-1648, 1649-1650, 1651-1652, 1653-1654, 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2201-2202, 2203-2204, 2205-2206, 2207-2208, 2209-2210, 2211-2212, 2213-2214, 2215-2216, 2217-2218, 2219-2220, 2221-2222, 2223-2224, 2225-2226, 2227-2228, 2229-2230, 2231-2232, 2233-2234, 2235-2236, 2237-2238, 2239-2240, 2241-2242, 2243-2244, 2245-2246, 2247-2248, 2249-2250, 2251-2252, 2253-2254, 2255-2256, 2257-2258, 2259-2260, 2261-2262, 2263-2264, 2265-2266, 2267-2268, 2269-2270, 2271-2272, 2273-2274, 2275-2276, 2277-2278, 2279-2280, 2281-2282, 2283-2284, 2285-2286, 2287-2288, 2289-2290, 2291-2292, 2293-2294, 2295-2296, 2297-2298, 2299-2300, 2301-2302, 2303-2304, 2305-2306, 2307-2308, 2309-2310, 2311-2312, 2313-2314, 2315-2316, 2317-2318, 2319-2320, 2321-2322, 2323-2324, 2325-2326, 2327-2328, 2329-2330, 2331-2332, 2333-2334, 2335-2336, 2337-2338, 2339-2340, 2341-2342, 2343-2344, 2345-2346, 2347-2348, 2349-2350, 2351-2352, 235

in the evidence we have given unusual consideration to that part of it bearing upon this point. Defendants both testified and produced as witnesses two of their roomers, who corroborated their testimony in substance that prior to the installation of this new equipment the premises were well heated (from 75 to 80 degrees); that immediately after the installation of the burner and other equipment the temperature fell as low as 50 degrees. Defendants were, of course, interested witnesses but their knowledge as to whether the premises were or were not heated was superior to that of any other witnesses. The roomers who testified we may assume were disinterested witnesses, although their relationship to defendants might be presumed to have some effect upon their testimony. In weighing the evidence it has seemed clear to us that if the equipment as installed proved to be defective in respect to the production of heat, this would have become at once manifest to the owners and to the roomers and would have led to immediate and strenuous complaint.

We regard the testimony of defendant, Fred B. Lee, on this point so important that we reproduce it as it appears in the record. Upon cross-examination he was asked: "Q. When was the first complaint made? A. Two or three weeks after it was installed." Again he was asked: "Q. Mr. Lee, when is the first time you complained about the heating of your premises? A. About two or three weeks afterward. Q. You are sure of that? A. I said two or three weeks. Q. Didn't you complain of the consumption of oil - only? A. No. Not of oil only. Q. You made a complaint of the heating? A. Naturally I would complain about heat. Q. Did you write a letter to the plaintiff in this case? A. Yes, sir. Q. You complained about the heating temperature in the letter? A. Yes, sir."

Mr. Lee was then shown the letter and stated he wrote it. The letter, dated April 10, 1937, is found in an additional abstract prepared by the plaintiff and is as follows:

"Dear Sir:

"Having left two phone calls at your office for you to call me

in the evidence we have given unusual consideration to that point of it bearing upon this point. Defendants have testified and produced as witnesses two of their roomers, who corroborated their testimony in substance that prior to the installation of this new equipment the premises were well heated (from 75 to 80 degrees); that immediately after the installation of the burner and other equipment the temperature fell as low as 60 degrees. Defendants were, of course, interested witnesses but their knowledge as to whether the premises were or were not heated was superior to that of any other witnesses. The roomers who testified we may assume were disinterested witnesses, although their relationship to defendants might be presumed to have some effect upon their testimony. In weighing the evidence it has seemed clear to us that if the equipment as installed proved to be defective in respect to the production of heat, this would have become at once manifest to the owners and to the roomers and would have led to immediate and strenuous complaint.

We regard the testimony of defendant, Fred W. Lee, on this point as important that we reproduce it as it appears in the record. Upon cross-examination he was asked: "Q. When was the first complaint made? A. Two or three weeks after it was installed." Again he was asked: "Q. Mr. Lee, when is the first time you complained about the heating of your premises? A. About two or three weeks afterwards. Q. You are sure of that? A. I said two or three weeks. Q. Didn't you complain of the consumption of oil - only? A. No, not of oil only. Q. You made a complaint of the heating? A. Naturally I would complain about heat. Q. Did you write a letter to the plaintiff in this case? A. Yes, sir. Q. You complained about the heating temperature in the letter? A. Yes, sir."

Mr. Lee was then shown the letter and stated he wrote it. The letter, dated April 10, 1937, is found in an additional exhibit prepared by the plaintiff and is as follows:

"Dear Sir:

"Having left no phone call at your office for you to call me

and not getting any response, I am hereby bringing to your attention that which I wanted to discuss with you over the phone.

"The oil burner that was installed in my bldg. on March 19, 1937, consumed 575 gal. of oil in 17 days. I believe that the reason for this great amount of oil being burned was because one of the units was shorted which caused the burner to run unnecessarily.

"As a report of the above matter was made to you by Mr. Davidson, Mr. Lyons and your service man, I am asking for a credit of one half of the amount spent by me for oil through no fault of mine.

"Hoping to hear from you by return mail, or if you care to call I am at home any evening after 6:30."

The letter does not complain about heat.

Moore, president of the plaintiff corporation, Davidson, and Lyons all testified to a number of visits to the premises and of conversations with both defendants prior to the writing of this letter. They all say no complaint was ever made to them by either defendant about the failure of the equipment to properly heat the premises. This letter tends very much to corroborate their testimony. It is true defendants both say complaints were also made by them concerning the amount of heat furnished. The weight of the testimony of the witnesses for the respective parties was for the trial judge who saw and heard them. The question for his determination was whether the plaintiff had established its case by a preponderance of the evidence. In this court the question for our determination is whether the finding of the trial court is clearly and manifestly against the weight of the evidence. This rule of law is so well settled in this state that we think it necessary to cite only one authority. City of Quincy v. Kemfer, 304 Ill. 303, 306-307.

For the reasons stated the judgment will be affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and McSurely, J., concur.

and not getting any response, I in turn went to your attention that which I wanted to discuss with you over the phone.

"The oil burner that was installed in my house, on March 19, 1957, consumed 875 gal. of oil in 12 days. I believe that the reason for this great amount of oil being burned was because the unit was shorted which caused the burner to run unnecessarily.

"As a report of the above matter was made to you by Mr. Davidson, Mr. Lyons and your service man, I am asking for a credit of one half of the amount spent by me for oil through no fault of mine.

"Hoping to hear from you by return mail, as it has since to call I am at home any evening after 6:30."

The letter does not complain about heat.

Moore, president of the plaintiff corporation, Davidson, and

Lyons all testified to a number of visits to the premises and of

conversations with both defendants prior to the writing of this

letter. They all say no complaint was ever made to them by either

defendant about the failure of the equipment to properly heat the

premises. This letter seems very much to contradict their testi-

mony. It is true defendants both say complaints were also made by

them concerning the amount of heat furnished. The weight of the

testimony of the witnesses for the respective parties was for the

trial judge who saw and heard them. The question for his determi-

nation was whether the plaintiff had established its case by a pre-

ponderance of the evidence. In this court the question for our

determination is whether the finding of the trial court is clearly

and manifestly against the weight of the evidence. This rule of law

is so well settled in this state that we think it necessary to cite

only one authority. City of Quincy v. Keweenaw, 304 Ill. 202, 192-207.

For the reasons stated the judgment will be affirmed.

THOMAS W. MOORE, President

Quincy, Ill., and Keweenaw, Ill., County.

41430

THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. LEO P. RATKOWSKI, et al.,
Appellants,

v.

EDWARD J. KELLY, as Mayor of the City
of Chicago, et al.,
Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

309 I.A. 445'

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The relators are the owners of separate judgments against the city of Chicago rendered July 14, 1938, aggregating \$31,884.98. They filed a petition for mandamus to compel the payment of these judgments. The petition alleged the judgments were due and owing prior to January 1, 1935; that there was sufficient money in the Judgment Tax Fund to pay the judgments and that payment should be made.

The answer of the city admits the rendition of the judgments prior to January 1, 1935, and that the judgments are for liquidated debts due but avers the petition was prematurely filed in that while there was \$107,638.52 in the Judgment Tax Fund there were other judgments against the city also entered prior to January 1, 1935, for liquidated debts to the amount of \$2,533,180.04; that one of these was in favor of the Sanitary District of Chicago on which the last of several payments was made by the city December 20, 1930, leaving unpaid the principal sum of \$2,515,000; also that one Cohn and the Northwestern Yeast Company hold judgments against the city for \$67,085.06 and \$30,492.78, respectively, both of which were rendered prior to the judgments of relators, and filed petitions for mandamus to compel the payment of each of these judgments prior to the date on which the petition of relators was filed, namely, February 27, 1940.

The city, therefore, contends that relators' suit is precluded by §697a of the Judgment Tax act (Smith-Hurd Laws, Stats., ch. 24, p. 381). This section in part provides: "Judgments against

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such city shall be paid out of said fund in the order in which the same were obtained."

The city also contends plaintiffs are precluded by an ordinance of the city of Chicago. (Municipal Code of Chicago, 1939, §§7 -29.) This ordinance is not set up in the pleadings. However, we took judicial notice of it and held it valid in People ex rel. Krajci v. Kelly, 279 Ill. App. 22 at 23. The ordinance, like the statute, provides judgments "shall be paid in the order of the date of entry upon the records of the court."

It is admitted mandamus was the proper method to compel payment of judgments against the city. Relators further contend the date of the order of entry of judgment does not determine the order of payment and in support cite the three cases of People ex rel. Farwell v. Kelly, 361 Ill. 54, 367 Ill. 616 and 367 Ill. 631.

The only witness who testified upon the hearing was Mr. Hill of the city comptroller's office. His evidence disclosed payment of a number of judgments without regard to the time of entry. These payments were not, however, voluntary and with two exceptions were made out of funds other than the Judgment Tax Fund. Relators call our attention to People ex rel. Mercantile Nat'l Bank of Chicago v. City of Chicago, 307 Ill. App. 667, where a judgment of mandamus ordering payment of a judgment against the city was affirmed. We considered that case in People ex rel. John v. Kelly, 308 Ill. App. 80, and said the "principal question was whether the City could properly loan \$600, 000 out of the Judgment Fund to be used for other purposes. The court held this could not be done and it appears if this was restored to the fund there would be sufficient to pay the claim." Upon that ground, apparently, the Second Division sustained the judgment of the trial court.

In People ex rel. Garis v. Kelly, Can. No. 41470 (opinion filed February 17, 1941) this court following the Krajci and John cases held the judgment disregarding the tax refund judgment

... ..

The city also contains [illegible] and [illegible] by its [illegible]
[illegible] of the city of Chicago, [illegible] [illegible] [illegible]
[illegible]. This ordinance is not set up in the [illegible] [illegible]
we took judicial notice of it and said it was a [illegible] [illegible]
Bell v. Bell, 200 Ill. App. 2d 67, 289 N.E.2d 811, 13-2
therefore, previous judgments "shall be held to be [illegible] [illegible]"

The only witness who recalled seeing a person at the
order of payment and in support of the three orders of payment.
The date of the order of entry of judgment was not known by the
payment of judgment against the wife. The date of payment

It is admitted evidence that the person named as having

[illegible]

1. The first question is whether the defendant is a citizen of the United States. The defendant is a citizen of the United States.

On 10/10/1944, the following information was received from the Bureau of the Census, Washington, D. C.:

-3-

statute to be erroneous and reversed it. This court is committed to the propositions that the ordinance and statute are valid, as was held in the Krajci and John cases. We do not understand the Supreme court in the Farwell cases holds to the contrary.

The judgment will be affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and McSurely, J., concur.

statute to be pronounced and reversed it. This court is composed of
the proposition that the evidence and facts are well known
held in the United and John cases. We do not understand the United
court in the United case holds to the contrary.

The judgment will be affirmed.

United States.

1. United, 241, and United, 242, United.

41430

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LEO P. RATONSKI, et al.,
Appellants,

v.

EDWARD J. KELLY, as Mayor of the City
of Chicago, et al.,
Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

309 I.A. 445²

ON REHEARING.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Relators, owners of unpaid judgments against the City of Chicago, filed a petition praying for mandamus to compel payment from the Judgment Tax Fund. The City answered denying relators' right to mandamus and setting up the defense that the petition was premature and the suit precluded by § 627A of the Judgment Tax Act (Smith-Hurd Anno. Stat., Chap 24, p. 381). The court heard the evidence, found for defendants and dismissed the suit.

On appeal to this court the judgment was affirmed. A petition for rehearing was denied April 14, 1941. The opinion discloses that the decision of this court followed our prior decision in People ex rel. Cohn v. Kelly, 306 Ill.App. 20, where under similar facts it was held relators there were not entitled to maintain the suit.

On April 26, 1941, relators made a motion to set aside the order denying their petition for rehearing and to continue the matter. In support of the motion our attention was called to the fact that the Supreme Court had granted leave to appeal in People ex rel. Cohn v. Kelly, and that the appeal was pending in the Supreme Court. The motion for a continuance was allowed.

Relators now move that the petition for rehearing be

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

Approved for Release by NSA on 09-11-2013 pursuant to E.O. 13526

[illegible]

Journal of Management Education, Vol. 20, No. 6, December 1996

DOI: 10.1002/eqe.2407, 2015, <http://onlinelibrary.wiley.com/doi/10.1002/eqe.2407>

[illegible]

• 22 •

7. *Journal of Management Education*, 1999, 23(1), 11-20.

and the need for more self-reliance and self-analysis.

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• get more involved with staff, union and trustees

allowed, the judgment of the trial court reversed and the cause remanded with directions to the trial court to issue the writ forthwith. In support of this motion they submit the opinion of the Supreme Court in People ex rel. Caba v. Kelly, No. 26175, in which petition for rehearing was denied November 18th, 1941. There are no suggestions to the contrary. Therefore, in conformity with the opinion of the Supreme Court in that case, the petition for rehearing here is granted, the judgment of the Circuit Court reversed and the cause remanded to that court with directions to issue the writ as prayed forthwith.

VERDICT GRANTED, JUDGMENT REVERSED
AND CAUSE REMANDED WITH DIRECTIONS.

McSurely, P. J., and O'Connor, J. concur.

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SHELDON W. GOVIER
CLERK

CLERK'S OFFICE
APPELLATE COURT FIRST DISTRICT
STATE OF ILLINOIS
MICHIGAN BOULEVARD BUILDING
30 NORTH MICH. AVE.
CHICAGO November 19, 1941.

Chicago Bar Association
27 S. LaSalle Street
Chicago, Illinois.

Gentlemen:

Attention Mr. J. E. Burke

Enclosed find the opinion on a rehearing in the case of People ex rel Ratkowski et al., vs. Kelly et al., our General Number 41430 filed November 13, 1941 by the Judges of the First Division, Appellate Court, First District, Illinois.

This opinion is not to be published in full.

The Attorneys have to and including November 23, 1941 in which to file their petition for rehearing in said cause.

The original opinion was filed in this Court on March 31, 1941, the petition for rehearing was denied on April 14, 1941 and on May 2nd, 1941 on motion of Appellants the order of April 14, 1941 denying the rehearing was vacated and set aside; and on November 13, 1941 this Court granted a rehearing in said cause as shown in the enclosed opinion.

Yours very truly,

Sheldon W. Govier
Clerk of Appellate Court.

JPM:MM:

41473

FRANK Y. COFFIN, et al.,
Appellees,
v.
LULU KWASNIEWSKI, et al.,
Appellants.

} APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

309 I.A. 445³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiffs (co-partners), February 15, 1938, filed their bill to foreclose a trust deed executed August 24, 1936, by Lulu Kwasniewski and Edward Kwasniewski, her husband, conveying to the Chicago Title and Trust Company, as trustee, premises in Cook county, to secure their note for \$852.15. Lulu Kwasniewski answered defending on the ground that the note and trust deed were procured from herself and her husband by threat of criminal prosecution of the husband and delivered to plaintiffs under duress, etc. Leo Schultz by leave intervened, filing a petition (afterward amended) averring he was the owner of the premises at the time the trust deed was executed; that Lulu Kwasniewski held the title in trust for him; and that she had informed the representatives of plaintiffs at the time of executing the trust deed that she held for him. The petition and the answer both asked that the note and trust deed might be declared null and void.

Plaintiffs answered the intervening petition denying its material averments and filing a replication to the answer. The cause was referred to a master to take the evidence and report. The master reported recommending the petition be dismissed for want of equity and foreclosure of the trust deed granted.

Exceptions by Schultz and Mrs. Kwasniewski were overruled by the chancellor and a decree entered as prayed on May 21, 1940. This appeal followed.

There is practically no controversy as to the law applicable. The issues of fact are controlling. The master and the trial court found against petitioner and against the defendant, Mrs. Kwasniewski,

FRANK Y. GORTON, et al.,
Appellants,

COUNTY,

Appellants,

MR. JUSTICE WATSON DELIVERED THE OPINION OF THE COURT.

Plaintiffs (co-defendants), February 18, 1938, filed their bill to foreclose a trust deed executed August 24, 1935, by Julia Krasniowski and Edward Krasniowski, her husband, conveying to the Chicago Title and Trust Company, as trustee, premises in Cook County, to secure their note for \$332.15. Julia Krasniowski answered defending on the ground that the note and trust deed were procured from herself and her husband by threat of criminal prosecution of the husband and delivered to plaintiffs under duress, etc. Also, plaintiffs by leave intervened, filing a petition (afterwards amended) averring he was the owner of the premises at the time the trust deed was executed; that Julia Krasniowski held the title in trust for him; and that she had informed the representatives of plaintiffs at the time of executing the trust deed that she held for him. The petition and the answer both asked that the note and trust deed might be declared null and void.

Plaintiffs answered the intervening petition denying its material averments and filing a motion for summary judgment. The cause was referred to a master to take the evidence and report. The master reported recommending the petition be dismissed for want of equity and foreclosure of the trust deed granted.

Exceptions by defendants and Mrs. Krasniowski were overruled by the chancellor and a decree entered as prayed on May 31, 1941. This appeal followed.

There is practically no controversy as to the law applicable to the facts of this case. The master has found that the trust deed was procured from the husband and delivered to the plaintiffs under duress, etc. The master has also found that the husband was the owner of the premises at the time the trust deed was executed.

on the facts. The rule in this court is that findings of a master approved by the court will not be disturbed unless manifestly against the weight of the evidence. North Side Cash and Door Co. v. Hecht, 295 Ill. 515; Pasedach v. Aus, 364 Ill. 491; Metropolitan Life Ins. Co. v. Shattas, 298 Ill. App. 336; Lamis v. Hanson, 302 Ill. App. 404.

The premises are known as 2308 N. Hoyne avenue and are improved by a two-flat building with a cottage in the rear. Defendant, Lulu Kwasniewski, is the widow of Edward Kwasniewski, who died November 29, 1937. In his lifetime he was in business as an insurance broker and real estate dealer. Leo Schultz conducted a grocery business at 2113 N. Damen avenue. He owned the building and conducted his business there for twenty-five years. He had known Edward Kwasniewski for thirty years and Lulu Kwasniewski for forty years. Schultz lived at 2113 N. Damen avenue and the Kwasniewskis lived across the street at 2111 N. Damen avenue. The real estate and insurance business of Kwasniewski was conducted in the basement of his home. Leo Schultz was a customer.

Through Edward Kwasniewski, Schultz says he loaned to Peter Jaworski (whom he also knew) \$3500, for which Jaworski gave him note dated August 30, 1930, for \$3500, and a trust deed by which as security for the note these premises were conveyed to Lulu Kwasniewski, as trustee. Interest was paid to Edward Kwasniewski who repaid it to Schultz. The loan was once extended. Defaults were afterwards made, and September 24, 1935, Lulu Kwasniewski, through her attorney, Joseph A. Shapiro, filed a bill to foreclose the trust deed in the Circuit court of Cook county. Her bill alleged she was the owner of the note. The bill made Lulu Kwasniewski, as trustee, a defendant to the suit.

In the meantime Edward Bojak had become the owner of the premises, and while the suit was pending through a settlement made with Lulu Kwasniewski, through Shapiro, her solicitor, Bojak by deed dated October 31, 1935, conveyed these premises to Lulu Kwasniewski.

on the facts. The rule in this court is that findings of a master approved by the court will not be disturbed unless manifestly against the weight of the evidence. North Atlantic Ins. Co. v. ... 202 Ill. 515; Parsons v. ... 204 Ill. 411; International ... Co. v. Shawnee, 202 Ill. App. 736; Leah v. ... 202 Ill. 402. The premises are known as 2323 N. Taylor Avenue and are improved by a two-story building with a cottage in the rear. Defendant, Luis Kwasniewski, is the widow of Henry Kwasniewski, who died November 29, 1927. In his lifetime he was in business as an insurance broker and real estate dealer. His accounts comprised a grocery business at 2113 N. Damen Avenue. He owned the building and conducted his business there for twenty-five years. He has known Edward Kwasniewski for thirty years and until Kwasniewski's death. Kwasniewski lived at 2113 N. Damen Avenue and the Kwasniewskis lived across the street at 2111 N. Damen Avenue. The real estate and insurance business of Kwasniewski was conducted in the basement of his home. Luis Kwasniewski was a witness.

Through Edward Kwasniewski, Kwasniewski wife is known to Edward Janowski (whom he also knew) 12300. For which Janowski gave his note dated August 30, 1920, for \$2500, and a check dated up with it recently for the note these premises were conveyed to Luis Kwasniewski, as trustee. Interest was paid to Edward Kwasniewski and principal to Kwasniewski. The loan was once extended. Kwasniewski wife died on September 24, 1927, and Kwasniewski, through his attorney, Joseph R. Shapiro, filed a bill to foreclose the trust deed in the Circuit Court of Cook County. That bill alleged and was the owner of the note. The bill made Luis Kwasniewski, as trustee, a defendant in the suit.

In the meantime Edward had become the owner of the premises, and while the suit was pending through a settlement made with Luis Kwasniewski, through Shapiro, her solicitor, which was made dated October 21, 1928, conveyed these premises to Luis Kwasniewski.

The deed was delivered on its date and recorded November 2, 1935. Mrs. Kwasniewski executed a release of the trust deed which was also recorded. Whereupon, her suit to foreclose was dismissed without costs. Mr. Shapiro, her solicitor, testified on the trial that he prepared a letter which was signed by Edward Bojak, notifying tenants of the building to pay rent to the new owner, Lulu Kwasniewski.

Mrs. Kwasniewski and Mr. Schultz testified on this trial that she was acting for him and held title to the premises as trustee for him. Mrs. Kwasniewski testified that when plaintiffs pressed for payment of their claim against her husband she told their representatives (Mr. Ames, their manager and Mr. Berchem, their attorney) that the premises did not belong to her but to Schultz. She testified that they nevertheless insisted on the execution of the note and trust deed and threatened to prosecute her husband criminally if these papers were not executed. Her testimony is denied by Mr. Ames and Mr. Berchem, and their testimony is corroborated by all the circumstances as well as by the testimony of Mr. Shapiro, who acted as her solicitor on the foreclosure, and as her attorney at the time the note and mortgage were executed and delivered. If her testimony is true, Mr. Schultz was much wronged by herself and her husband. He, however, shows no resentment. In the trial court and in this court they have been represented by the same solicitor and a single brief is filed in their behalf.

The master found that the defense of non-ownership of the real estate by Mrs. Kwasniewski and knowledge of such fact, either actual or implied, by plaintiffs had not been sustained by a preponderance of the evidence. We have carefully examined the evidence and find it to be inherently improbable and are persuaded that if the finding of the master had been otherwise it would have been the duty of this court to set it aside as clearly and manifestly against the weight of the evidence.

The deed was delivered on its face and recorded December 2, 1915. Mrs. Kwasniewski executed a release of the trust deed which was also recorded. Whereupon, her exit as foreclosed was dissolved without costs. Mr. Shapiro, her solicitor, testified on the trial that he prepared a letter which was signed by Edward Hagan, notifying tenants of the building to pay rent to the new owner, Louis Kwasniewski.

Mrs. Kwasniewski and Mr. Schultz testified on this trial that she was acting for him and held title to the premises as trustee for him. Mrs. Kwasniewski testified that when plaintiff's process for payment of their claim against her husband she told their respective lawyers (Mr. Ames, their lawyer and Mr. Bertram, their attorney) that the premises did not belong to her but to Schultz. She testified that they nevertheless insisted on the execution of the note and trust deed and threatened to prosecute her husband criminally if these papers were not executed. Her testimony is denied by Mr. Ames and Mr. Bertram, and their testimony is corroborated by all the circumstances as well as by the testimony of Mr. Shapiro, who acted as her solicitor on the foreclosure, and as her attorney at the time the note and mortgage were executed and delivered. It was testimony is true, Mr. Schultz was much swayed by her will and her husband. He, however, shows no resentment. In the trial court and in this court they have been represented by the same solicitor and a single brief is filed in their behalf.

The master found that the defense of non-ownership of the real estate by Mrs. Kwasniewski and knowledge of such fact, either actual or implied, by plaintiff had not been sustained by a preponderance of the evidence. We have carefully examined the evidence and find it to be inherently improbable and are persuaded that the finding of the master and jury was correct. It would have been the duty of this court to set it aside as clearly and manifestly against the weight of the evidence.

For the purpose of proving constructive notice of his rights, Mr. Schultz produced as a witness Mrs. Rose Budnik, who was a tenant in the building on the premises prior to and after plaintiffs' trust deed was executed. She gave evidence on her direct examination tending to show that she leased the flat occupied by her from Mr. Schultz and paid her rent to him. She said she paid her first month's rent to Schultz in November, 1935; that she rented the flat for \$12 a month and had lived in it up to the time of the trial. She said she went to the store and Mr. Schultz went with her to the apartment. She says, "I was in the apartment just a few minutes on that occasion. I just looked it over and just went out because I had the baby in the buggy so I couldn't stay long. I paid him \$12, a month's rent, right then, in the apartment." Upon further cross-examination on a later day her attention was called to her previous testimony, and in reply to a question she answered that she had so testified. The record proceeds: "Q. And you didn't stay very long because you had the baby in the buggy? A. Well, the baby - yes, I didn't have no baby then. Q. You didn't have any baby in the buggy then? A. No, that was another lady friend of mine, she had a baby. Q. Well, didn't you say you had the baby in the buggy? A. I didn't say it was my baby. I said we had a baby in the buggy. Q. Who was the other lady that was with you? A. Oh, gosh, I don't know; she don't live out there now. As to what she looked like, what do I remember how she looked? My gosh, I don't know. I don't know really how she looks. She was really only a young woman."

Many instances of further inconsistencies in the testimony of Mrs. Budnik are found in the additional abstract of record, which seems to have been necessarily filed in order that a complete and truthful abstract should be presented to this court. As a matter of fact, Mr. Dargush, who lives at present at Woodruff, Wisconsin, but who acted as an inspector for the Chicago Title and Trust Company in 1936, Mr. Faust, a lawyer admitted to practice at the Chicago Bar in 1924 and since 1929 employed by the law department of the Chicago

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tending to show that she leased the flat occupied by her from Mr.
Schultz and paid her rent to him. She said she paid her first
month's rent to Schultz in November, 1933; that she rented the flat
for 12 a month and had lived in it up to the time of the trial.
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apartment. She says, "I was in the apartment just a few minutes on
that occasion. I just looked it over and just went out because I
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Q. Well, didn't you say you had the baby in the buggy? A. I didn't
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the other lady that was with me. Q. Oh, yes, I don't know; she
don't live out there now. As to what she looked like, what do I
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seems to have been repeatedly told in order that a complete and
truthful abstract should be presented to this court. As a matter of
fact, Mr. Schultz, who lives at 1234 N. Dearborn, St. Louis, Mo.,
who acted as an investigator for the Chicago Title and Trust Company in
1932, Mr. Schultz, a lawyer admitted to practice at the Chicago bar in
1932 and since 1933 employed by the law department of the Chicago

Title and Trust Company, and who withdrew an appearance which he had entered in the case in order to testify, and Mr. Stanley, who at the time went with Mr. Faust to act as an interpreter, gave testimony to the effect that she told them when questioned as to her occupancy of the premises that when she moved in in 1935 she rented from Kwasniewski, who she understood to be the owner of the premises. The testimony of Schultz and Mrs. Kwasniewski that she acted for him, held title for him and that she so informed plaintiffs' representatives when the trust deed and note on which this suit is based ^{were negotiated,} is most improbable.

Voluninous evidence was taken in this case to which the master, who saw and heard the witnesses, gave careful attention. He did not believe the testimony of the witnesses for defendant. His finding was approved by the trial judge and a careful examination of the record has convinced us that the finding of the master was right.

The order dismissing the petition of the intervenor and the decree of foreclosure will be affirmed.

ORDER AND DECREE AFFIRMED.

O'Connor, P.J., and McSurely, J., concur.

Titie and Trust Company, and who withdrew an appearance which he had entered in the case in order to testify, and Mr. Titie, who is the vice president of the Trust Company, gave testimony to the effect that she told them when questioned as to her knowledge of

the premises that when she moved in in 1925 she rented from Mrs. Titie, who she understood to be the owner of the premises. The testimony of Schmitz and Mrs. Luanne Schmitz that she asked for him, held Titie for him and that she so informed Luanne Schmitz, were negotiated, times when the trust deed and note on which this suit is based is

most improbable.

Voluntary evidence was taken in this case to which the master, who saw and heard the witnesses, gave careful attention. He did not believe the testimony of the witnesses for defendant. His finding was approved by the trial judge and a careful examination of the record has convinced us that the finding of the master was

right.

The order dismissing the petition of the intervenor and the decree of foreclosure will be affirmed.

ORDER AND DECREE AFFIRMED.

O'Connor, P.J., and McManis, J., concur.

41483

GERTRUDE B. WOLF,

Appellee,

APPEAL FROM

v.

CIRCUIT COURT,

PARKER HOLSMAN COMPANY, a
Corporation,

COOK COUNTY.

Appellant.

309 I.A. 446

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action by plaintiff to recover the amount of a check delivered by plaintiff to defendant, defendant filed first an answer, unverified, and afterwards an amended answer and counterclaim, both of which were verified. On motion of plaintiff the amended answer and counterclaim were stricken, judgment for plaintiff in the sum of \$500 (the amount of the check) was entered and defendant appeals.

From the pleadings it appears defendant on February 24, 1940, was a real estate broker employed by the Macchairs, owners of premises at 5527 Woodlawn avenue in Chicago, to negotiate a sale. Plaintiff on that date delivered her check to defendant for \$500, which was deposited in defendant's account. Defendant gave to plaintiff a receipt for the check, a copy of which is attached to the complaint and which in substance states that the \$500 is deposited "as earnest money on offer to buy the property known as 5527 Woodlawn avenue, Chicago, Illinois, (lot size approximately 40x175) at a price of \$19,000 and subject to mortgage (approximately \$10,600.00) expiring March 1, 1957; general taxes, insurance, rents, mortgage interest and principal payments and water tax to be pro-rated as of delivery of deed. Possession is to be given May 1, 1940, and Chicago Title and Trust Company Owner's Guarantee Policy is to be furnished by seller in the amount of the purchase price. Acceptance of these terms and conditions is to be given you by the sellers of the property on or before 8:00 A. M., February 25, 1940, or this deposit refunded."

GEORGE E. BROWN

Attorney

Chicago, Ill.

THE JUSTICE DEPARTMENT DIVISION OF THE COURT

In an action by plaintiff to recover the amount of a check delivered by plaintiff to defendant, defendant filed first an answer, verified, and afterwards an amended answer and counter-claim, both of which were verified. On motion of plaintiff the amended answer and counter-claim were stricken, judgment for plaintiff in the sum of \$500 (the amount of the check) was entered and defendant appealed.

From the pleadings it appears defendant on February 14, 1937, was a real estate broker employed by the defendant, owners of premises at 3837 Woodlawn Avenue in Chicago, to negotiate a sale. Plaintiff on that date delivered her check to defendant for \$500, which was deposited in defendant's account. Defendant gave to plaintiff a receipt for the check, a copy of which is attached to the complaint and which in substance states that the \$500 is deposited "as earnest money on offer to buy the property known as 3837 Woodlawn Avenue, Chicago, Illinois, (lot nine approximately 40x175) at a price of \$12,000 and subject to mortgage (approximately \$10,000.00) including March 1, 1937; general taxes, insurance, rent, mortgage interest and principal payments and water tax to be pro-rated as of delivery of deed. Possession is to be given May 1, 1938, and Chicago Title and Trust Company's guarantee policy is to be furnished by seller in the amount of the purchase price. Acceptance of house given and verified as to be given for the subject of the property on or before May 1, 1938, at which time defendant."

The complaint says that prior to the time the owner accepted this offer she withdrew it, notified defendant and requested the return of the money, which defendant refused. The amended answer says defendant "was authorized in writing to act for the said MacNairs"; that it had spent \$1000 in placing the premises on the market and had many applicants ready, able and willing to buy; that it "admits" (which the complaint did not aver) plaintiff made "an offer in writing" to buy the premises, paid the \$500 and assented to the receipt as her offer and ratified the same in writing by making her check; that plaintiff then urged defendant to take the property off the market, which it refused to do; that plaintiff directed defendant to reach her by telephone when the offer was accepted in a distant part of the city, where she said she would be; that defendant secured the acceptance of the MacNairs and so informed plaintiff at 1:30 on the morning of February 25, 1940; that plaintiff said, "The house is mine. I do not want any other person to visit it. Take it off the market and do not let anyone enter the premises other than ourselves"; that defendant replied, "Depending upon your agreement with us to carry out the purchase, we will take the premises off the market," to which plaintiff assented. Defendant says relying on the statement of plaintiff it removed the real estate from its list, notified customers their permit to see the house was canceled and accepted no further offers.

The amended answer denies that plaintiff withdrew the offer prior to its acceptance but says on the contrary that the owners accepted the same before 8:00 A.M., February 25, 1940, and that February 29, 1940, plaintiff refused to carry out the agreement made February 24 and accepted February 25, 1940. The amended answer says plaintiff has no right to the \$500; that it is either the property of the owner or the property of defendant, and asks the owners be made additional parties defendant.

The counterclaim, adopting averments of the amended answer, says that February 25, 1940, when defendant told plaintiff of the

The complaint says that prior to the time the owner received this offer she withdrew it, notified defendant and requested the return of the money, which defendant refused. The amended answer says defendant "was authorized in writing to act for her said 'Mischke'; that it had spent \$1000 in placing the premises on the market and had many applicants ready, able and willing to pay; that it 'admits' (which the complaint did not aver) plaintiff made an offer in writing 'to buy the premises, paid the \$500 and handed to the receipt as her offer and notified the same in writing by making her check; that plaintiff then urged defendant to take the property off the market, which it refused to do; that plaintiff directed defendant to reason her by telephone when the offer was accepted in a distant part of the city, where she said she would be; that defendant secured the acceptance of the Mischke and so informed plaintiff at 1:30 on the morning of February 23, 1940; when plaintiff said, 'The house is mine. I do not want any other person to visit it. Take it off the market and do not let anyone enter the premises other than ourselves'; that defendant replied, 'depending upon your agreement with us to carry out the purchase, we will take the premises off the market,' to which plaintiff assented. Defendant says relying on the statement of plaintiff it removed the real estate from its list, notified customers and finally to see the house was cancelled and accepted no further offers. The amended answer denies that plaintiff withdrew the offer prior to its acceptance but says on the contrary that the owner accepted the same before 6:00 A.M., February 23, 1940, and that February 23, 1940, plaintiff refused to carry out the agreement made February 23 and accepted February 23, 1940. The amended answer says plaintiff has no right to the \$500; that it is either the property of the owner or the property of defendant, and asks the owners be made additional parties defendant. The counterclaim, setting aversals of the amended answer,

acceptance of the owners, plaintiff, having theretofore determined not to carry out her agreement and knowing of defendant's definite appointments to show the premises to applicants on February 26, "falsely and fraudulently and with an intent to deceive the counter-plaintiff, and well knowing that the counter-plaintiff relied on her words, said to this counter-plaintiff, 'The house is mine. I do not want any other person to visit it. Take it off the market and do not show it to anyone, and do not let anyone enter the premises other than ourselves'" to which defendant replied, "Depending upon your agreement with us to carry out the purchase, we will take the premises off the market," to which plaintiff assented. That defendant relying on this statement of plaintiff removed the real estate from its list, notified customers of cancelation of permits to see the house and accepted no further offers; that nevertheless, on February 29, 1940, plaintiff refused to carry out her agreement and still refuses, while the owners have at all times been ready, willing and able, etc. The counterclaim says defendant was deceived by the false and fraudulent statements of plaintiff known by her to be false, and thereby lost the sale of the premises to its damage in the sum of \$1000. A second count of the counterclaim recites the same alleged statements and claims \$1000 damages for failure to carry out the contract.

Section 36 of the Civil Practice act (Smith-Wurd Anno. Stats. ch. 110, par. 160, p. 195) provides in substance that whenever an action, defense or counterclaim is founded on a written instrument, a copy of it or that part of it relevant must be attached to the pleading as an exhibit, or the pleader show it is not accessible. Defendant has not complied with this provision of the statute. The inference is that there is no writing of plaintiff other than the check or of defendant other than the receipt. The original transaction of February 24, 1940, was in substance nothing more than an offer and could be revoked by plaintiff at any time before acceptance.

acceptance of the owners, Plaintiff, having previously determined not to carry out her agreement and knowledge of defendant's belief appointments to show the premises to applicant on February 22, 1943, and fraudulently and with an intent to deceive the counter-plaintiff, and well knowing that the counter-plaintiff relies on her words, said to this counter-plaintiff, "The house is alone. I do not want any other person to visit it. Take it off the market and do not show it to anyone, and do not let anyone enter the premises other than ourselves" to which defendant replied, "I am pending upon your agreement with me to carry out the premises, and will take the premises off the market," to which Plaintiff assented. That defendant relying on this statement of Plaintiff removed the real estate from the list, notified outstays of cancellation of permit to see the house and accepted no further offers that were made, on February 22, 1943, Plaintiff refused to carry out her agreement and still refused, while the owners have at all times been ready, willing and able, etc. The counter-plaintiff was deceived by the false and fraudulent statement of Plaintiff known by her to be false, and thereby lost the sale of the premises to the damage in the sum of \$1000. A second count of the counter-plaintiff recites the same alleged statements and claims \$1000 damages for failure to carry out the contract.

Section 38 of the Civil Practice Act (Section 38, Civil Practice Act, § 110, par. 160, c. 125) provides in substance that whenever an action, defense or counterclaim is founded on a written instrument, a copy of it or that part of it relevant may be attached to the pleading as an exhibit, or the pleader may if it is not accessible, Defendant has not complied with this provision of the statute. The inference is that there is no writing of Plaintiff other than the check or of defendant other than the receipt. The original was on February 24, 1943, and in substance nothing more than an offer and could be revoked by Plaintiff at any time before acceptance.

Gross v. Arnold, 177 Ill. 575; Beth Weber v. Hulbert, 225 Ill. App. 321; Sideman v. Baumann, 262 Ill. App. 182; Thompson v. Killheffer, 99 N. J. L. 439.

The amended answer avers acceptance before the offer was withdrawn. The subject matter of the alleged agreement concerned the purchase of real estate. The statute of Frauds was applicable. (Smith-Hurd Anno. Stats., ch. 59, §2, p. 539.) It was necessary the contract should be in writing, signed by the party to be charged thereunder or by someone lawfully authorized thereto in writing. The pleading of defendant charges that plaintiff made the receipt her contract by signing her name to the check. The check contains no reference whatever to the receipt or to any offer. Where an alleged memorandum consists of several writings the part signed by the party to be charged must so clearly refer to the part or parts not signed that no other document could be intended. Mayer v. Hirsch, Stein & Co., 212 Ill. App. 441. However, if it is conceded the check and receipt refer to each other and may be considered together, the writing would still be insufficient under the statute since the memorandum must in order to comply with this statute contain the names of both the buyer and the seller, which these do not. Kohlbrecher v. Guettermann, 329 Ill. 246; Stein v. McKinney, 313 Ill. 84; 27 Corpus Juris 275; Brown on the Statute of Frauds, 5th Ed. p. 495.

Further, if the receipt and the check may be regarded as sufficient evidence of the contract, defendant would nevertheless fail because there is no sufficient allegation in the pleading that defendant was authorized in writing to act for the owners. Volmut v. Bern, 346 Ill. 619. Here the failure of defendant to comply with §36 of the Civil Practice act becomes important and controlling. Staley v. The Illinois Threshermen's Mutual Ins. Co., 246 Ill. App. 279; Aukopoviez v. Heymann, 300 Ill. App. 243, 20 N. E. (2nd) 826. Moreover, the language of the receipt itself negatives any inference

321; Edman v. Bannan, 202 Ill. App. 102; Thompson v. Killebrew, 202 Ill. App. 102; Weyer v. Killebrew, 202 Ill. App. 102.

The amended answer averred acceptance before the offer was

withdrawn. The subject matter of the alleged agreement concerned the purchase of real estate. The statute of Illinois was applicable. (Smith-Hurd Annos. Stat., ch. 82, § 2, p. 530.) It was necessary

the contract should be in writing, signed by the party to be charged thereunder or by someone lawfully authorized thereto in writing.

The pleading of defendant charges that plaintiff made the receipt her contract by signing her name to the check. The check contained

no reference whatever to the receipt or to any other. There is alleged memorandum consists of several writings the part signed by

the party to be charged must so clearly refer to the party or parties not signed that no other document could be intended. Weyer v.

Nixon, 212 Ill. App. 441. However, if it is conceded the check and receipt refer to each other, and may be considered together, the writing would still be insufficient under the statute

since the memorandum must in order to comply with this statute contain the names of both the buyer and the seller, which these do not.

Kohlbrecher v. Gutterman, 200 Ill. 346; Wain v. Kohnen, 212 Ill. 346.

84; 87 Corpus Juris 275; known on the statute of Illinois, 202 Ill. App. 102.

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Wain, 212 Ill. 319. Here the failure of defendant to comply with 530 of the Civil Practice not become important and controlling.

Staley v. The Illinois Thrashers' Mutual Ins. Co., 202 Ill. App. 102; Autovick v. Korman, 202 Ill. App. 102, 103 (2nd) 321.

Moreover, the language of the receipt itself negatives any inference

of authority in defendant to accept the offer for the owners or make a contract for them.

The counterclaim sets up improbable facts in view of the other circumstances alleged and seeks to base an estoppel to set up the statute of Frauds because of an alleged verbal promise of plaintiff. The statute cannot be thus evaded. Koenig v. Dohm, 209 Ill. 468; Keller v. Joseph, 329 Ill. 148; Lowenberg v. Booth, 330 Ill. 548. The counterclaim was not filed with the original answer as required by §38(2) of the Civil Practice act. The questions on the merits arising under it are substantially the same as those we have above considered. The counterclaim was filed without permission of the court, and we think it was within the court's discretion to strike it.

It is urged the court should have granted defendant's motion to make the MacNairs parties defendant. We think there was no error in refusing so to do. The MacNairs did not have a claim of interest within the meaning of §24 of the Civil Practice act. (Smith-Murd Anno. Stats., par. 148, p. 107.) This section is based upon §211 of the New York Civil Practice act and the New Jersey laws. P.L. 1912, p. 377. There is nothing in the pleadings tending to show the owners were necessary parties to a complete determination of this controversy. They are not charged with any liability. Stern v. Geo. P. Ide & Co., 209 N. Y. S. 473, 212 App. Div. 714; VanCott v. DeVries, Inc., 37 Fed. (2d) 48. The judgment will be affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and McSurely, J., concur.

of authority in defendant to accept the offer for the purpose of making a contract for them.

The court's decision rests upon the fact that in view of the other circumstances alleged and seems to have an effect on the statute of frauds because of an alleged verbal promise of plaintiff. The statute cannot be thus avoided. Smith v. Jones, 100 N.Y. 211, 34 N.Y. 211, 100 N.Y. 211, 34 N.Y. 211, 100 N.Y. 211, 34 N.Y. 211. The court's decision was not filed with the original answer as required by § 32(2) of the Civil Practice Act. The question on the merits arising under it was substantially the same as those we have above considered. The court's decision was filed without permission of the court, and we think it was within the court's discretion to

reverse it.

It is urged the court should have granted defendant's motion to make the Macfarlane parties defendant. We think there was no error in refusing so to do. The Macfarlane did not have a claim of liability within the meaning of § 24 of the Civil Practice Act. (Section 24 of the Civil Practice Act, par. 140, § 107.) This section is based upon § 21 of the New York Civil Practice Act and the New Jersey Law. § 21, 100 N.Y. 211, 34 N.Y. 211, 100 N.Y. 211, 34 N.Y. 211, 100 N.Y. 211, 34 N.Y. 211. There is nothing in the pleadings tending to show the answers were necessarily parties to a complete determination of this controversy. They are not charged with any liability. Smith v. Jones, 100 N.Y. 211, 34 N.Y. 211, 100 N.Y. 211, 34 N.Y. 211, 100 N.Y. 211, 34 N.Y. 211. The judgment will be affirmed.

REVEREND JUSTICE

O'Connor, J., and McGinnis, J., concur.

41518

STANDARD FEDERAL FIRE INSURANCE
COMPANY, a Corporation,

v.

ALLIED STATE SECURITIES CORPORATION,
a Corporation, et al.,

GEORGE D. THOMPSON,

Appellant,

v.

CHICAGO TITLE AND TRUST COMPANY, as
Trustee under Trust Deed bearing
Doc. No. 8819961, et al.,

Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

309 T.A. 446²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

March 31, 1928, plaintiff (an Iowa corporation) filed a bill to foreclose a trust deed conveying premises in Cook county to the Chicago Title and Trust Company to secure payment of notes for \$30,000, executed by the Allied State Securities Corporation. Summons issued, was served on some defendants and publication made for others, including unknown owners. A receiver was appointed, qualified and took possession. Some defendants defaulted. Jaffray, et al. intervened and answered. The cause was referred to Master Williams September 27, 1928, and November 13, 1930, this order was set aside (Master Williams having died), and there was a rereference to Master Harry A. Riley.

June 19, 1934, Judge Friend entered this order: "On motion of Court it is ordered that the above entitled cause be and the same is hereby dismissed without costs for want of prosecution." No further orders were entered until July 15, 1938, when plaintiff presented to Judge Burke a petition to reinstate and redocket the cause. The petition asked an order on the receiver to file an account and that the case be set for hearing and decree.

The petition set up the proceedings above recited, six orders (the last February 16, 1931) authorizing the receiver to make repairs

STANDARD TRUST AND INVESTMENT COMPANY, a corporation,
 Plaintiff,
 v.
 ALLIED STATE SECURITIES CORPORATION, a corporation, et al.,
 Defendants.
 CHICAGO TITLE AND TRUST COMPANY, as Trustee under Trust Deed bearing Doc. No. 8819961, et al.,
 Defendant.

MR. JUSTICE MATHESON DELIVERED THE OPINION OF THE COURT.

March 31, 1928, plaintiff (an Iowa corporation) filed a bill to foreclose a trust deed conveying premises in Cook county to the Chicago Title and Trust Company to secure payment of notes for \$20,000, executed by the Allied State Securities Corporation. Summons issued, was served on some defendants and publication made for others, including unknown owners. A receiver was appointed, qualified and took possession. Some defendants defaulted. Jeffrey, et al. answered and answered. The cause was referred to Master William September 27, 1928, and November 12, 1930, this order was set aside (Master Williams having died), and there was a reference to Master Harry A. Riley.

June 12, 1931, Judge Riley entered this order: THE COURT OF Court it is ordered that the above entitled cause be and the same is hereby dismissed without costs for want of prosecution. No further orders were entered until July 12, 1932, when plaintiff presented to Judge Burke a petition to reinstate and rehear the cause. The petition asked an order on the receiver to file an account and that the case be set for hearing and decree.

The petition set up the proceedings above recited, and ordered (the last paragraph is, I think) maintaining the receiver as was the

and two orders of March 14, 1930, and March 5, 1931, giving the receiver leave to enter into leases. It averred the receiver was in possession, had collected \$17,000 and had expended upwards of \$14,000, and on information and belief charged that Master Williams took testimony of 262 typewritten pages in support of the bill and intervening petition and took the cause under advisement; that the original complainant and the maker of the notes became insolvent; that the Commissioner of Insurance of Iowa was appointed receiver by the court of that state and with its approval sold the principal notes, trust deed and its title to the suit to petitioner, George D. Thompson. The petition said the cause was inadvertently placed on the trial call of Judge Friend for June 19, 1934, without any notice to the parties and solicitors, the master or the receiver, and the order of dismissal entered. The petitioner said he had a meritorious cause of action, and would suffer irreparable injury unless the prayer of the petition was granted.

July 15, 1938, Judge Burke entered this order: "that the order entered herein June 19, 1934 was inadvertently entered by this court while the case was pending before a Master in Chancery, and while a Receiver was in possession of the property being foreclosed which receiver is still in possession of the property by his tenant, and was entered without notice to the parties in interest; and that said order of June 19, 1934, be and is hereby expunged and set aside; and it is further ordered that said cause be and is hereby reinstated and redocketed in this court under the original number B-160554 on the Chancery side of this court; and that further proceedings may be taken in said cause as if said order of June 19, 1934 had never been entered."

October 20, 1939, by leave, on order of Judge Finnegan, an amended and supplemental complaint were filed which named Chicago Title and Trust Company as trustee and other parties defendants, including "Edward A. Miller as assignee of Sidney F. Brown." The sup-

and two orders of March 14, 1930, and March 5, 1931, giving the receiver leave to enter into leases. It averred the receiver was in possession, had collected \$17,000 and had expended upwards of \$14,000, and on information and belief charged that Master Williams took testimony of 252 typewritten pages in support of the bill and intervening petition and took the same under advisement; that the original complainant and the maker of the notes became insolvent; that the Commissioner of Insurance of Iowa was appointed receiver by the court of that state and with its approval sold the principal notes, trust deed and its title to the suit to petitioner, George E. Thompson. The petition said the cause was inadvertently placed on the trial call of Judge Friend for June 19, 1934, without any notice to the parties and solicitors, the master on the receiver, and the order of dismissal entered. The petitioner said he had a meritorious cause of action, and would suffer irreparable injury unless the prayer of the petition was granted.

July 18, 1934, Judge Friend entered the following order entered herein June 19, 1934 was inadvertently entered by this court while the case was pending before a Master in Chancery, and while a Receiver was in possession of the property being foreclosed, which receiver is still in possession of the property by his tenant, and was entered without notice to the parties in interest; and that said order of June 19, 1934, be and is hereby expunged and set aside; and it is further ordered that said cause be and is hereby reinstated and rebooked in this court under the original number E-160554 on the Chancery side of this court; and that further proceedings may be taken in said cause as it said order of June 19, 1934 has never been entered.

October 20, 1933, by leave, on order of Judge Friend, an amended and supplemental complaint were filed which named Chicago Title and Trust Company as trustee and other parties defendants, including "Edward A. Miller as assignee of Stanley E. Brown." The sup-

plemental bill states the premises are improved with a two-story brick building approximately 60x60 feet, occupied by tenants; asks an accounting, a deficiency decree and other relief. The complaint was verified.

An affidavit of unknown owners was filed and an order entered substituting Thompson as plaintiff. Publication was made for unknown owners. Summons issued and was served on Edward A. Miller, assignee of Sidney F. Brown, and others. January 15, 1940, Miller filed a special appearance and moved to dismiss the cause for the reason that more than thirty days had elapsed between June 19, 1934, when the order of Judge Friend was entered, and July 15, 1938, when the order of Judge Burke reinstating the cause was entered. (Laws of 1933, p. 678, §§1, 2 and 3.) The motion stated the court on July 15, 1938, was without jurisdiction of the subject matter or the parties. In support Miller filed an affidavit setting up facts heretofore recited. June 28, 1940, an order was entered by Judge Finnegan finding that Judge Burke on June 19, 1934, was without jurisdiction of the subject matter or the parties because more than thirty days had elapsed after June 19, 1934, and no appeal or writ of error had been prosecuted.

Plaintiff says the only point in the appeal is whether §72 of the Civil Practice act (Smith-Hurd Anno. Stats., ch. 110, par. 196, p. 782) grants power to reinstate a chancery cause inadvertently dismissed. Miller admits §72 is applicable to a decree in chancery but says there was no error of fact to correct because no further orders were entered in the cause after November 13, 1930, when it was re-referred to Master Riley. It was not, he says, pending before the master and Judge Burke was, therefore, without jurisdiction to enter the order of reinstatement. We do not agree. It has been held in several cases that in the absence of special circumstances (none of which appear here) it is error to dismiss a cause which is standing on reference to a master and that the cause may be reinstated although the term at which it was entered has passed. Maniatis v. Carelin, 287 Ill. App. 154; Carstedt v. Mills Novelty Co., 298 Ill.

elemental bill states the premises are removed with a two-story brick building approximately 60x30 feet, occupied by tenants; also an excavation, a bathroom house and other outbuildings. The building was verified.

An affidavit of unknown owners was filed and an order entered substituting Thompson as plaintiff. Publication was made for unknown owners. Summons issued and was served on Edward A. Miller, assignee of Sidney F. Brown, and others. January 15, 1940, Miller filed a special appearance and moved to dismiss the cause for the reason that more than thirty days had elapsed between June 19, 1934, when the order of Judge Burke was entered, and July 15, 1938, when the order of Judge Burke reinstating the cause was entered. (Laws of 1938, p. 878, §§1, 2 and 3.) The motion stated the court on July 15, 1938, was without jurisdiction of the subject matter on the parties. In support Miller filed an affidavit setting up facts heretofore recited.

June 28, 1940, an order was entered by Judge Finnegan finding that Judge Burke on June 19, 1934, was without jurisdiction of the subject matter or the parties because more than thirty days had elapsed after June 19, 1934, and no appeal or writ of error had been presented.

Plaintiff says the only point in the appeal is whether §78 of the Civil Practice act (Smith-Rand Anno. Stats., art. 110, par. 128, p. 782) grants power to reinstate a chancery cause inadvertently dismissed. Miller admits §78 is applicable to a decree in chancery and says there was no error of fact or context because no further errors were entered in the cause after November 13, 1930, when it was referred to Master Riley. It was not, he says, pending before the master and Judge Burke was, therefore, without jurisdiction to enter the order of reinstatement. We do not agree. It has been held in several cases that in the absence of special circumstances (none of which appear here) it is error to dismiss a cause which is standing on reference to a master and that the cause may be reinstated although the term at which it was entered has passed. Wentz v. Carver, 387 Ill. App. 184; Carver v. Miller, 387 Ill. App. 184; Carver v. Miller, 387 Ill. App. 184.

App. 275; McClay v. Williamson, 247 Ill. App. 141; Frank v. Newburger, 298 Ill. App. 548. Notice of application was served on all parties. None objected. If the attention of Judge Friend had been called to the fact that this cause had been referred to a master or ^{that} a receiver had been appointed and was in possession who had not accounted, it is manifest the order of dismissal would not have been entered. Clearly, the action of the court was the result of inadvertence and was an error of fact. The court, therefore, had jurisdiction notwithstanding the expiration of the term or time ordinarily limited by statute for moving to set this order aside.

Defendant Miller says plaintiff is precluded by negligence or laches. Judge Finnegan did not so find. The order is based solely on lack of jurisdiction. We have seen such jurisdiction existed. Nor is there laches or unexcused negligence here. The order of Judge Finnegan does not find either. Facts are not disclosed from which we might draw such inference.

Defendant says the reinstatement of the cause may not be permitted to deprive him of property rights acquired after the order of Judge Friend dismissing the cause was entered. That question is not before us on this appeal. If defendant has any rights in the premises it is to be presumed these will be adjudicated in the proceeding to which he is now a party.

We may add that irrespective of §72 we think the chancery court was not without power or jurisdiction to correct an order manifestly entered by inadvertence. People v. Janssen, 263 Ill. App. 104. The order appealed from will be reversed and the cause remanded with directions for a rule on defendant Miller to plead to the amended and supplemental bill.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P.J., and McSurely, J., concur.

REVEREND AND HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

41470

BRINK'S, Incorporated, a Corporation
and BRINK'S EXPRESS COMPANY, a
Corporation,

v.

ELIZABETH GRAVESEN and The Trust
Company of Chicago, as Guardians of
the Estate of CARL GRAVESEN, a minor,
Appellees,

APPEAL FROM

SUPERIOR COURT,
COOK COUNTY.

LOU NATHANSON,

Appellant.

309 I.A. 571

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs filed their complaint of interpleader against defendants stating they held \$4825, being the balance due on a judgment entered against them of \$19,300 and that defendants be required to interplead and the court decree to whom the money should be paid. Defendants were served, filed their answers and afterward an order was entered that plaintiffs pay the \$4825 to the clerk of the court, which was done. The matter was referred to a master in chancery who took the evidence, made up his report and recommended that the \$4825 be paid to defendant, Lou Nathanson. Objections to the report were filed and overruled; they were ordered to stand as exceptions which the court sustained and ordered that the money be paid to the other defendants as guardians of the estate of Carl Gravesen, a minor, and Nathanson appeals.

Nathanson's position is that he was employed by the parents of the minor to prosecute a claim for personal injuries against Brink's and that he was also authorized by the Probate court to do so, which he proceeded to do until he was removed without cause, other counsel employed and that he was entitled to an attorney's lien of \$4825, being 25% of the amount for which the personal injury case was settled.

On the other side the guardians' position is, (1) that Nathanson solicited employment as attorney for the minor's case and

BRINK'S, Incorporated, a Corporation
and BRINK'S EXPRESS COMPANY, a
Corporation,

Defendants.

ELIZABETH GRAVESON and The Trust
Company of Chicago, as Guardians of
the Estate of CARL GRAVESON, a minor,
Appellants.

JOHN COUNTY.

LOU NATHANSON,

Appellant.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs filed their complaint of interference against defendants stating they held \$4825, being the balance due on a judgment entered against them of \$19,300 and that defendants be required to interfere and the court decree to whom the money should be paid. Defendants were served, filed their answers and afterward an order was entered that plaintiffs pay the \$4825 to the clerk of the court, which was done. The matter was referred to a master in chancery who took the evidence, made up his report and recommended that the \$4825 be paid to defendant, Lou Nathanson. Objections to the report were filed and overruled; they were ordered to stand as exceptions which the court sustained and ordered that the money be paid to the other defendants as guardians of the estate of Carl Graveson, a minor, and Nathanson appeals.

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On the other side the guardians' position is, (1) that Nathanson solicited employment as attorney for the minor's case and

the contract of employment was therefore unenforcible, and (2) that the question of solicitation had been settled by an order of the Probate court by which Nathanson was removed and the order is not subject to question in the instant proceeding.

The record discloses that at about 8:45 o'clock on the morning of February 26, 1936, Carl Gravesen, aged twelve years, was injured in a collision between one of Brink's trucks and a grocer's automobile. He was ~~taken~~ to the Garfield Park Hospital where it was found an operation was necessary and his right leg was amputated above the knee. About two hours thereafter Mrs. Anna Fox, who lived in the neighborhood where the minor and his parents lived and whose son went to the same school with Carl, called at the hospital to see him. She went to the room where Carl was and there met his father, introduced herself to him and suggested that Nathanson be retained as attorney to handle the matter against Brink's. Shortly afterward she left the room, met Nathanson in the Lobby of the hospital and told him about the matter. He was at the hospital to visit his wife who had had a baby a few days before. Shortly thereafter Mrs. Fox and Nathanson went back to the boy's room and she there introduced Nathanson (who sought employment as an attorney to handle the case) to the boy's father. Nathanson then left, went to his wife's room and about half an hour thereafter, Mrs. Fox called him from the room and they again went to Carl's room where they met Mr. and Mrs. Gravesen. After some discussion concerning Nathanson's employment in handling the case, it was decided the hospital was not the place to make such an agreement but that Nathanson should call that evening at the Gravesen's home. Nathanson then left the hospital and about 7 o'clock that evening he and his brother-in-law, Bernstein, who was associated with him in the practice of law, called on the Gravesen's at their home. After considerable discussion about being retained, and after they drank some whisky furnished by Gravesen, the Gravesens signed a contract employing Nathanson to handle the case for 25% in case of settlement or 33% in case there was a trial.

the contract of employment was therefore unenforceable, and (3) that the question of solicitation had been settled by an order of the Probate court by which Nathanson was removed and the order is not subject to question in the instant proceeding.

The record discloses that at about 8:45 o'clock on the morning of February 28, 1935, Carl Gravesen, aged twelve years, was injured in a collision between one of Brink's trucks and a grocer's automobile. He was taken to the Garfield Park Hospital where it was found an operation was necessary and his right leg was amputated above the knee. About two hours thereafter Mrs. Anna Fox, who lived in the neighborhood where the minor and his parents lived and whose son went to the same school with Carl, called at the hospital to see him. She went to the room where Carl was and there met his father, introduced herself to him and suggested that Nathanson be retained as attorney to handle the matter against Brink's. Shortly afterwards she left the room, met Nathanson in the lobby of the hospital and told him about the matter. He was at the hospital to visit his wife who had had a baby a few days before. Shortly thereafter Mrs. Fox and Nathanson went back to the boy's room and she there introduced Nathanson (who sought employment as an attorney to handle the case) to the boy's father. Nathanson then left, went to his wife's room and about half an hour thereafter, Mrs. Fox called him from the room and they again went to Carl's room where they met Mr. and Mrs. Gravesen. After some discussion concerning Nathanson's solicitation in handling the case, it was decided the hospital was not the place to make such an agreement but that Nathanson should call that evening at the Gravesen's home. Nathanson then left the hospital and about 7 o'clock that evening he and his brother-in-law, Bernstein, who was associated with him in the practice of law, called on the Gravesen's at their home. After considerable discussion about being retained, and after they drank some whisky furnished by Gravesen, the Gravesens signed a contract employing Nathanson to handle the case for \$25 in case of settlement or \$50 in case there was a trial.

The next day, February 27, Bernstein called at the Gravesen's home, took the boy's father to breakfast and drove him to the police court where the cases against the drivers of the truck and automobile which caused the injury were continued. He then took Gravesen to Nathanson's office and Nathanson took Gravesen to the Probate court where a petition was filed by Gravesen who alleged he was guardian of his injured son, setting up the injuries suffered by the boy the day before; that he had retained Nathanson to represent him in the prosecution of an action for personal injuries, and the prayer was that he be authorized to retain Nathanson to prosecute the action. An order was entered by the Probate court in accordance with the prayer.

On the next day representatives of the Hebard Storage Company went to the Gravesen's home, packed up and moved the household goods to their new address, for which services Nathanson or Bernstein paid the bill. Prior to that date when Nathanson had been at the Gravesen's home the question of moving was discussed and although no definite arrangements had been made, the moving van and men appeared the next morning. Bernstein appears to have had an account with the storage company and received a credit of \$2 from the bill of the Hebard Company for moving the Gravesen's household goods.

Some time afterward Nathanson prepared a complaint to be filed against Brink's but stated he did not want to bring suit too soon, and March 26, 1936, Mrs. Gravesen filed a verified petition in the Probate court praying that her husband be removed as guardian of the minor's estate and that Nathanson be removed as attorney. In the petition she set up the injuries received by her minor son; the amputation of his leg at the hospital; the appearance of Nathanson there representing he was a lawyer of wide experience in handling personal injury cases and that he be employed to prosecute or settle the minor's claim; the calling of Nathanson at her home on the evening the son was injured and substantially stating the matters to which we have heretofore referred.

The next day, February 27, Bernstein called at the Gravesen's home, took the boy's father to breakfast and drove him to the police court where the case against the driver of the truck and automobile which caused the injury were continued. He then took Gravesen to Nathanson's office and Nathanson took Gravesen to the Probate court where a petition was filed by Gravesen who alleged he was guardian of his injured son, setting up the injuries suffered by the boy the day before; that he had retained Nathanson to represent him in the prosecution of an action for personal injuries, and the prayer was that he be authorized to retain Nathanson to prosecute the action. An order was entered by the Probate court in accordance with the prayer.

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Some time afterward Nathanson prepared a complaint to be filed against Brink's but stated he did not want to bring suit too soon, and March 26, 1936, Mrs. Gravesen filed a verified petition in the Probate court praying that her husband be removed as guardian of the minor's estate and that Nathanson be removed as attorney. In the petition she set up the injuries received by her minor son; the amputation of his leg at the hospital; the expense of Nathanson there representing he was a lawyer of wide experience in handling personal injury cases and that he be employed to prosecute or settle the minor's claim; the calling of Nathanson at her home on the evening the son was injured and substantially stating the matters to which we have previously referred.

Nathanson filed his answer to the petition denying "various charges of solicitation and unethical conduct on his part, made in the petition" and averred he was requested by the Gravesens to take charge of the matter for them; that he accepted the employment and began working on the case, appeared in the Probate court and procured the entry of an order appointing him as attorney; that he afterward investigated the facts in the case; had negotiated with the liability insurance company and obtained an offer of \$10,000 in settlement of the claim; that he caused notice of attorney's lien to be served as required by the statute; that he was entitled to his lien and that the charges against him were a mere subterfuge made for the purpose of procuring other counsel.

April 3, 1936, the Probate court entered an order in which it was recited the matter came on to be heard on Mrs. Gravesen's petition for the removal of the guardian and the attorney; that the guardian had consented thereto in writing; that the court heard the evidence and being fully advised ordered that Gravesen be removed as guardian "and that the order heretofore entered authorizing one Lou Nathanson to act as attorney for the guardian of said minor and to institute a suit on behalf of said minor to recover for said minor's personal injuries, be and the same is hereby vacated and set aside and the said Lou Nathanson is hereby removed as attorney for said guardian."

April 8, another order was entered by the Probate court on the verified petition of Mrs. Gravesen and the Trust Company of Chicago as guardians of the minor and it was ordered that the guardians employ Ryan, Sinnott & Miller to prosecute or settle the claim of the minor against Brink's and that they be paid for their services one-fourth of the amount that might be recovered by settlement or one-third in case there was a trial. Shortly thereafter, Ryan, Sinnott & Miller, as attorneys for the guardians, brought an action in the Circuit court of Cook county against Brink's to recover damages for personal injuries, About a year thereafter when

Nathanson filed his answer to the petition denying "various charges of solicitation and unethical conduct on his part, made in the petition" and averred he was requested by the Graveneses to take charge of the matter for them; that he accepted the employment and began working on the case, appeared in the Probate court and procured the entry of an order appointing him as attorney; that he afterward investigated the facts in the case; had negotiated with the liability insurance company and obtained an offer of \$10,000 in settlement of the claim; that he caused notice of attorney's lien to be served as required by the statute; that he was entitled to his lien and that the charges against him were a mere subterfuge made for the purpose of procuring other counsel.

April 8, 1928, the Probate court entered an order in which it was recited the matter came on to be heard on Mrs. Gravenese's petition for the removal of the Guardian and the attorney; that the Guardian had consented thereto in writing; that the court heard the evidence and being fully advised ordered that Gravenese be removed as Guardian "and that the order heretofore entered authorizing one Lou Nathanson to act as attorney for the Guardian of said minor and to institute a suit on behalf of said minor to recover for said minor's personal injuries, be and the same is hereby vacated and set aside and the said Lou Nathanson is hereby removed as attorney for said Guardian."

April 8, another order was entered by the Probate court on the verified petition of Mrs. Gravenese and the Trust Company of Chicago as Guardians of the minor and it was ordered that the Guardians employ Ryan, Sinnott & Miller to prosecute or settle the claim of the minor against Brink's and that they be paid for their services one-fourth of the amount that might be recovered by settlement or one-third in case there was a trial. Shortly thereafter Ryan, Sinnott & Miller, as attorneys for the Guardians, brought an action in the Circuit court of Cook county against Brink's to recover damages for personal injuries. About a year thereafter when

the case was reached for trial a final offer of settlement was made for \$19,300, and shortly thereafter, May 19, 1937, the guardians procured an order of the Probate court authorizing settlement for that amount and that they pay 25% thereof to Ryan, Sinnott & Miller. Thereafter judgment was entered in the personal injury case for \$19,300. Three-fourths of this sum was paid to the guardians, the remaining one-fourth or \$4825 was retained by Brink's and later they brought the instant suit and paid the money into court as stated.

There is considerable other evidence in the record both oral and documentary and considerable argument in the briefs of both parties pointing out what they contend is shown by the evidence but we think it would serve no purpose to comment further on the evidence

In the decree the chancellor found Mrs. Fox was acting for Nathanson when she appeared at the hospital and solicited the Gravesens to employ Nathanson to prosecute the son's personal injury claim. He further found the sole controverted question of fact on the hearing in the Probate court to remove Nathanson was whether Nathanson had solicited the parents to retain him, and concluded that the order of the Probate court removing Nathanson was final and conclusive upon the question, and Nathanson was estopped from disputing that order of the Probate court.

Upon a consideration of all the evidence in the record we are of opinion it clearly shows Nathanson solicited employment from the Gravesens in such a manner as to render his contract of employment by them unenforceable. We think all the evidence shows Mrs. Fox was not acquainted with the Gravesens at the time of the accident. She appeared at the hospital room shortly after the boy's leg was amputated; there she met the boy's father and immediately began to solicit him to employ Nathanson. She then went down to the lobby of the hospital and there met Nathanson and after talking to him shortly thereafter they both appeared again in the boy's room where employment was again solicited from Mr. and Mrs. Gravesen. At that time it is clear the parents of the boy were in no condition to con-

the case was reached for trial a final offer of settlement was made for \$19,300, and shortly thereafter, May 19, 1937, the Guardians executed an order of the Probate court authorizing settlement for that amount and that they pay 25% thereof to Ryan, Sinnott & Miller. Thereafter judgment was entered in the personal injury case for \$19,300. Three-fourths of this sum was paid to the Guardians, the remaining one-fourth or \$4825 was retained by Brink's and later they brought the instant suit and paid the money into court as stated.

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sider the question of collecting money because it was not then at all certain he would live. There is evidence that at the time Mrs. Fox and Nathanson were in the boy's room the doctor and the nurse came into the room and told them they must leave - there must be absolute quiet - but this evidence is contradicted. That evening Nathanson and his brother-in-law appeared at the Gravesen's home. They say they were invited there and they again solicited for the employment of Nathanson, and having found that the Gravesens are about to move, the moving is arranged for by the brother-in-law, Bernstein, and the next morning the moving van appears. The household effects are moved and the bill paid by Bernstein on which he is given a \$2 credit. The day after the injury Nathanson hurries to the Probate court and procures an order for his employment in the matter.

What we said in Puls v. Chicago & Northwestern Railroad Co., 233 Ill. App. 625, (abst.) is applicable here. "The manner in which this claim was solicited, is, in our opinion, inconsistent with and contrary to the ethics of the profession and the public policy of the State, and in such case attorney's fees may not be recovered. Ingersoll et al v. Coal Creek Coal Co., 117 Tenn. 263; The People v. Berezniak, 292 Ill. 305."

The doctrine of estoppel by verdict has been held to apply to judgments of the Probate court. Healea v. Verne, 343 Ill. 325-332. In that case the court in considering whether the doctrine of estoppel by verdict applied said: "The rule extends to the judgments of probate courts, and their judgments and decrees are not subject to review collaterally by the circuit courts for error. Potter v. Clapp, 203 Ill. 592; Sheahan v. Madigan, 275 id. 372; Hoit v. Snodgrass, 315 id. 548."

after the question of collecting money because it was not then at all certain he would live. There is evidence that at the time Mrs. Fox and Nathanson were in the boy's room the doctor and the nurse came into the room and told them they must leave - there must be absolute quiet - but this evidence is contradicted. That evening Nathanson and his brother-in-law appeared at the Gravesen's home. They say they were invited there and they again solicited for the employment of Nathanson, and having found that the Gravesens are about to move, the moving is arranged for by the brother-in-law, Bernstein, and the next morning the moving van appears. The household effects are moved and the bill paid by Bernstein on which he is given a \$2 credit. The day after the injury Nathanson hurries to the Probate court and procures an order for his employment in the

what we said in Pula v. Chicago & Northwestern Railroad Co., 233 Ill. App. 625 (2d), is applicable here. "The manner in which this claim was solicited, is, in our opinion, inconsistent with and contrary to the ethics of the profession and the public policy of the State, and in such case attorney's fees may not be recovered."

Interpretation of the doctrine of estoppel by verdict has been held to apply to judgments of the Probate court. Healey v. Verna, 246 Ill. 325. In that case the court in considering whether the doctrine of estoppel by verdict applied said: "The rule extends to the judgments of probate courts, and their judgments and decrees are not subject to review collaterally by the circuit courts for error." Butter v. Glasp, 208 Ill. 522; Shenah v. Medigan, 245 Ill. 372; Holt v. Hodgkiss, 315 Ill. 542.

The decree of the Superior court of Cook county is affirmed.

DECREE AFFIRMED.

McSurely, J., concurs.

Mr. Justice Matchett dissenting:

I do not think the doctrine of estoppel by verdict is applicable here to the order of the Probate court. I do not approve, from the standpoint of professional ethics, either of the way one lawyer got the case or the others took it away from him. Our Supreme court has never, so far as the briefs inform, settled the question of whether a contract obtained as this was is valid.

The degree of the Superior Court of Cook County is retained.

THE COURT:

THE COURT:

Mr. Justice Macdonald dissenting:

I do not think the doctrine of estoppel by verdict is ap-

plicable here to the order of the Probate Court. I do not approve,

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Supreme Court has never, so far as the public knows, settled the

question of whether a contract obtained as this was is valid.

41531

309 ILL. App.

EVERETT BAKER,

Appellant,

APPEAL FROM

v.

CIRCUIT COURT,

WILLIAM DOWLING,

Appellee.

COOK COUNTY.

309 ILL. App. 572

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in the Justice's court against defendant to recover damages to his automobile claimed to have been caused by the negligence of defendant in driving his automobile as a result of which a collision occurred. The case was heard and a judgment entered in plaintiff's favor against defendant for \$187.10. On appeal to the Circuit court there was a trial before the court without a jury, a finding and judgment in defendant's favor and plaintiff appeals.

The record discloses that about 3 o'clock on Sunday afternoon, January 14, 1940, plaintiff was driving his new DeSoto automobile, which he had purchased a week before, south in Cicero avenue a little west of the center line of the pavement which was 40 feet wide; that he came to a stop on the north side of 111th street, an east and west street, and saw defendant's automobile coming north in Cicero avenue about 250 to 300 feet south of 111th street. The streets were icy and there was a light snow falling. Plaintiff turned his car to go east in 111th street and as he was about east of the east line of Cicero avenue defendant's northbound car struck plaintiff's car pushing it towards the north where it came in contact with an automobile belonging to a Mr. Parker, near the northeast corner of the street intersection. Both plaintiff's and Parker's automobiles were damaged and each brought suit against Mr. Dowling.

On the trial in the Circuit court both cases were heard at the same time. Defendant had filed a counterclaim against plaintiff Baker. At the beginning of the trial the court said: "Let the

1917

WILLIAM BAKER,

v.

WILLIAM DOWLING,

Appellee.

U. S. DISTRICT COURT, DISTRICT OF COLUMBIA, DIVISION OF THE COURT.

WILLIAM DOWLING, Plaintiff, vs. WILLIAM BAKER, Defendant.

Defendant to recover damages to his automobile claimed to have been caused by the negligence of defendant in driving his automobile as a result of which a collision occurred. The case was heard and a judgment entered in plaintiff's favor against defendant for \$187.10. On appeal to the Circuit Court there was a trial before the court without a jury, a finding and judgment in defendant's favor and plaintiff appeals.

The record discloses that about 3 o'clock on Sunday afternoon, January 14, 1940, plaintiff was driving his new DeSoto automobile, which he had purchased a week before, south in Cicero avenue a little west of the center line of the pavement which was 40 feet wide; that he came to a stop on the north side of 11th street, an east and west street, and saw defendant's automobile coming north in Cicero avenue about 250 to 300 feet south of 11th street. The streets were icy and there was a light snow falling. Plaintiff turned his car to go east in 11th street and as he was about east of the east line of Cicero avenue defendant's northbound car struck plaintiff's car pushing it towards the north where it came in contact with an automobile belonging to a Mr. Parker, near the north-east corner of the street intersection. Both plaintiff's and Parker's automobiles were damaged and each brought suit against Mr.

Dowling.

On the trial in the Circuit Court both cases were heard at the same time. Defendant had filed a counterclaim against plaintiff Baker. At the beginning of the trial the court said: "Let the

record show I am hearing the evidence and that it will apply on both Everett Baker vs. William Dowling and William Parker vs. William Dowling. 40C-1998 and 40C-1999."

At the close of plaintiff's evidence defendant's counsel moved for a finding in favor of defendant saying to the court: "I would like to make a motion and argue it. I really feel we can't improve much on our evidence. THE COURT: Do you want to rest or put in some evidence. I don't want to hear argument twice. If you want to put on some evidence, all right." Counsel for defendant: "I believe they haven't made out a case and I am willing to rest on the testimony that is in. *** I have witnesses but I don't think I can prove any more." After argument of counsel the court found in favor of Parker in his suit against defendant, and against Baker in the instant case, and Baker appeals.

Plaintiff took his car to a repair shop where it was repaired at a cost of \$187.10. The repairs were those necessitated by the collision and it was admitted the charge was reasonable. The evidence was sufficient to prove the damages sustained. Cloyes v. Plaatje, 231 Ill. App. 183; Sunbeam Beverage Co. v. Cunningham, 242 Ill. App. 401; Finch v. Carlton, 249 Ill. App. 15; Byalos v. Matheson, 328 Ill. 269.

Defendant contends he was not guilty of any negligence; that the collision was caused by the negligence of plaintiff and that plaintiff failed to prove damages. It is argued plaintiff was guilty of negligence because he failed to give a signal of his intention to turn to the east at 111th street, as provided by statute, and a number of sections of the statute are cited, but the only section applicable to the situation involved is §69, par. 166, ch. 95-1/2, Ill. Rev. Stats. 1939. That section provides: "Any driver of a vehicle approaching an intersection with the intent to make a left turn shall do so with caution and with due regard for traffic approaching from the opposite direction and shall not make such left turn until he can do so with safety." That section does not require

record show I am hearing the evidence and that it will apply on both
Everett Baker vs. William Dowling and William Parker vs. William
Dowling. 400-1000 and 400-1000.

At the close of plaintiff's evidence defendant's counsel
moved for a finding in favor of defendant saying to the court: "I
would like to make a motion and argue it. I really feel we can't
improve much on our evidence. THE COURT: Do you want to rest or put
in some evidence. I don't want to hear argument twice. If you want
to put on some evidence, all right." Counsel for defendant: "I
believe they haven't made out a case and I am willing to rest on the
testimony that is in. *** I have witnesses but I don't think I can
prove any more." After argument of counsel the court found in favor
of Parker in his suit against defendant, and against Baker in the
instant case, and Baker appeals.

Plaintiff took his car to a repair shop where it was repaired
at a cost of \$137.10. The repairs were those necessitated by the
collision and it was admitted the garage was responsible. The
evidence was sufficient to prove the damages sustained. Gibson v.
Prestige, 321 Ill. App. 123; Gunderson v. Everett, 320
Ill. App. 401; Smith v. Garrison, 320 Ill. App. 401; Watson,
323 Ill. 280.

Defendant contends he was not guilty of any negligence; that
the collision was caused by the negligence of plaintiff and that
plaintiff failed to prove damages. It is argued plaintiff was
guilty of negligence because he failed to give a signal of his in-
tention to turn to the east at Fifth street, as provided by statute,
and a number of sections of the statute are cited, but the only
section applicable to the situation involved is § 30, part 128, ch.
40-1, which reads: "When a vehicle is approaching an intersection with the intent to make a
left turn shall do so with caution and with due regard for traffic
approaching from the opposite direction and shall not make such left
turn until he can do so with safety." This section does not require

that a signal with the hand or otherwise be given. It is clear if plaintiff had given any such signal it was not required by the statute and would have been unavailing when we consider the facts in the case. The evidence was undisputed and it all shows defendant was driving at from 45 to 50 miles an hour; that he was unable to stop the car and it skidded, and there is some evidence his brakes locked. It is clear he was guilty of negligence and that plaintiff was in the exercise of due care. The damages caused were clearly proven and defendant having offered no evidence, being of opinion that although he had witnesses in court he could not dispute it, the judgment of the Circuit court of Cook county is reversed and judgment is entered in this court in favor of plaintiff and against defendant for \$187.10.

JUDGMENT REVERSED AND JUDGMENT ENTERED IN
THIS COURT.

Matchett, J., and McSurely, J., concur.

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was in the exercise of due care. The damages caused were clearly
proven and defendant having offered no evidence, being of opinion
that although he had witnesses in court he could not dispute it, the
judgment of the Circuit court of Cook county is reversed and judgment
is entered in this court in favor of plaintiff and against defendant

For 125.10.

JUDGMENT REVERSED AND JUDGMENT ENTERED IN
THIS COURT.

Matchett, J., and McHenry, J., concur.

41433

SIGRID JOHNSON,

Appellee,

v.

GUY A. RICHARDSON and WALTER J.
CUMMINGS, as Receivers, etc.,
et al., doing business as
CHICAGO SURFACE LINES,
Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

3091A. 572²

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff sought to recover damages for personal injuries which she sustained while attempting to board a street car operated by defendants; she had a verdict of \$4000, upon which judgment was entered and from which defendants appeal.

The incident happened about 5:45 on the evening of November 16, 1936, at Chicago avenue, near the intersection with Larrabee street which runs north from this point. One of Montgomery Ward & Company's stores is on the northwest corner of Chicago avenue and Larrabee street; plaintiff employed there for twenty-eight years used west bound Chicago avenue street cars when she returned to her home after working hours.

A safety island is located on Chicago avenue some distance east of Larrabee street and plaintiff says she was standing on this island waiting for a west bound Chicago avenue street car, which slowed down as it approached so that it was barely moving; that she reached for the center bar at the rear platform with her right hand and was about to place her left foot on the step when the car speeded up and something struck her, knocking her down, from which she suffered the injuries in question. Her witnesses say a man flipped or jumped on the street car while it was in motion and jostled against some of the people standing on the island, knocking them down.

Defendants say the regular stopping place at this time in the evening for west bound Chicago avenue cars was not at the safety island but at a switch point a short distance west of the

EDWARD JOHNSON

CHICAGO COUNTY
COURT

THE CHICAGO COUNTY COURT
IN CHARGE OF THE
JURY

THE CHICAGO COUNTY COURT

Plaintiff sought to recover damages for personal injuries which she sustained while attempting to board a street car operated by defendant; she had a verdict of \$4000, upon which judgment was entered and from which defendant appeals.

The incident happened about 8:45 on the evening of November 18, 1936, at Chicago avenue, near the intersection with Larabee street which runs north from this point. One of Montgomery Ward & Company's stores is on the northwest corner of Chicago avenue and Larabee street; plaintiff employed there for twenty-eight years used west bound Chicago avenue street cars when she returned to her home after working hours.

A safety island is located on Chicago avenue some distance east of Larabee street and plaintiff says she was standing on this island waiting for a west bound Chicago avenue street car, which slowed down as it approached so that it was barely moving; that she reached for the center bar at the rear platform with her right hand and was about to place her left foot on the step when the car speeded up and something struck her, knocking her down, from which she suffered the injuries in question. Her witnesses say a man flipped or jumped on the street car while it was in motion and jostled against some of the people standing on the island, knocking them down.

Defendants say the regular stopping place at this time in the evening for west bound Chicago avenue cars was not at the safety island but at a point about a short distance west of the

island; that as a car approached from the east and passed the island it slowed down but did not make a stop until it reached the regular stopping place west of the island.

There are two street car tracks in Chicago avenue and two in Larrabee street; street cars intending to go north on Larrabee go west on Chicago avenue and turn by switch to the north. The safety island described by the witnesses was about 40 feet long and 4-1/2 feet wide, raised about 5 to 8 inches above the street level; the west end of the island is about 101 feet east of the east building line of Larrabee street; the island was constructed and is maintained by the city of Chicago. A witness for defendants testified that the purpose of placing the island at this distance from the street intersection is to separate the traffic lanes and protect pedestrians on the street west of the island.

The switch point to divert cars from Chicago avenue north to Larrabee street is about 45 feet east of the east building line of Larrabee street and about 56 feet west of the west end of the island. This switch is electrically operated. A "pan" is located in the trolley wire about 50 or 60 feet east of the switch point and about opposite the west end of the island. If the electrical power is on when the trolley passes the pan the switch will be automatically set for a turn north into Larrabee street. If the electrical power is off when the trolley crosses the pan the switch will be automatically set to permit the street car to proceed west in Chicago avenue. The power is turned off of a west bound Chicago avenue car as its trolley approaches the island and the pan, and the car coasts past by its momentum, so that the switch will be set to proceed west in Chicago avenue.

We think it is clear that during daylight hours the usual stopping place for west bound Chicago avenue cars is opposite the south end of the Montgomery Ward building at the northwest corner of Chicago and Larabee, but in the evening when a large number of people are leaving this building the cars do not stop at this point

island; that as a car approached from the east and passed the island it slowed down but did not make a stop until it reached the regular stopping place west of the island.

There are two street car tracks in Chicago avenue and two in Larrabee street; street cars intending to go north on Larrabee go west on Chicago avenue and turn by switch to the north. The safety island described by the witnesses was about 40 feet long and 4-1/2 feet wide, raised about 3 to 3 inches above the street level; the west end of the island is about 101 feet east of the east building line of Larrabee street; the island was constructed and is maintained by the city of Chicago. A witness for defendants testified that the purpose of placing the island at this distance from the street intersection is to separate the traffic lanes and protect pedestrians on the street west of the island.

The switch point to divert cars from Chicago avenue north to Larrabee street is about 45 feet east of the east building line of Larrabee street and about 55 feet west of the west end of the island. This switch is electrically operated. A "pan" is located in the trolley wire about 50 or 60 feet east of the switch point and about opposite the west end of the island. If the electrical power is on when the trolley passes the pan the switch will be automatically set for a turn north into Larrabee street. If the electrical power is off when the trolley crosses the pan the switch will be automatically set to permit the street car to proceed west in Chicago avenue. The power is turned off of a west bound Chicago avenue car as its trolley approaches the island and the pan, and the car coasts past by its momentum, so that the switch will be set to proceed west in Chicago avenue.

We think it is clear that during daylight hours the usual stopping place for west bound Chicago avenue cars is opposite the south end of the Montgomery west building at the northwest corner of Chicago and Larrabee, but in the evening when a large number of people are leaving this building the cars do not stop at this point

but stop with the front end of the car opposite the switch point, or about 56 feet west of the west end of the island.

The motorman on the car in question testified he had been working on Chicago avenue continuously for about five or six years before this time and had never stopped at the island to take on or discharge passengers.

Although plaintiff's counsel argue the island was the regular stopping place for west bound Chicago avenue cars, yet none of the witnesses testified specifically that this was the regular stopping place, and a large number of them testified it was not the regular stopping place for west bound Chicago avenue street cars. The greater weight of the evidence is against plaintiff's position in this respect.

To accommodate the large number of people leaving Montgomery Ward & Co. at closing time in the evening the Chicago avenue cars stop opposite the switch point and passengers are permitted to board both at the front end and the rear end of the cars. Collectors for defendants are present to stand at the front entrance to collect fares from the passengers. A pole supporting the trolley wires is on the north side of Chicago avenue and about 24 feet east of the east building line of Larrabee, on which is painted a white band indicating a car stop.

One of these collectors of fares for west bound Chicago avenue street cars testified that on this evening he was standing at the switch point, which he said was the regular stopping place for west bound cars, and that there were 50 or 100 people waiting around there on Chicago avenue between the island and Larrabee street; that as the west bound car in question approached the island he noticed one or two men jump on the rear end; at the time there were also a number of people waiting on the island - the number is given at between 10 and 20 persons.

Plaintiff testified that as the west bound Chicago avenue car approached the island it slowed down and was barely moving; that

but stop with the front end of the car opposite the switch point, or about 85 feet west of the west end of the island.

The motorman on the car in question testified he had been working on Chicago avenue continuously for about five or six years before this time and had never stopped at the island to take on or discharge passengers.

Although plaintiff's counsel argues the island was the regular stopping place for west bound Chicago avenue cars, yet none of the witnesses testified specifically that this was the regular stopping place, and a large number of them testified it was not the regular stopping place for west bound Chicago avenue street cars. The greater weight of the evidence is against plaintiff's position in this respect.

To accommodate the large number of people leaving Montgomery Ward & Co. at closing time in the evening the Chicago avenue cars stop opposite the switch point and passengers are permitted to board both at the front end and the rear end of the cars. Collectors for defendants are present to stand at the front entrance to collect fares from the passengers. A pole supporting the trolley wire is on the north side of Chicago avenue and about 45 feet east of the east building line of Larabee, on which is painted a white band indicating a car stop.

One of these collectors of fares for west bound Chicago avenue street cars testified that on this evening he was standing at the switch point, which he said was the regular stopping place for west bound cars, and that there were 80 or 100 people waiting around there on Chicago avenue between the island and Larabee street; that as the west bound car in question approached the island he noticed one or two men jump on the rear end; at the time there were also a number of people waiting on the island - the number is given at between 10 and 20 persons.

Plaintiff testified that as the west bound Chicago avenue

she attempted to grab the center bar at the rear but the car picked up speed when she was struck by something. Other witnesses testified a man flipped the street car at the rear end at the eastern end of the island; that as the car passed the safety island it was moving all the time. Another witness testified that as the car slowed down before it reached the island a man jumped onto the step in the rear; that the speed seemed to throw his body away from the step and he knocked down three ladies who were on the island. Without detailing the testimony of the witnesses, it is established that a man who attempted to board the car as it was moving, knocked plaintiff down, from which she suffered injury.

There is no allegation of negligence in the construction or operation of the switch or pan. The evidence tends to show that the operation of the car was the usual and customary operation of the car at this time and place. As the car passed the island and approached the switch point the electrical power was off; people were standing on the island and up to the switch; as the car passed the island it was going about 5 miles an hour; that the car was coasting without power and slowed up and stopped right at the switch point, with the rear end of the car about 8 feet west of the safety island. It is a reasonable presumption that plaintiff, with others, went to the safety island expecting to board the slow moving car in order to get ahead of the crowd waiting to board the car at the regular stopping place opposite the switch.

It is not argued on behalf of plaintiff that she was a passenger on defendants' street car, and the jury was instructed, at her request, that it was the duty of defendants to exercise ordinary care and not the high degree of care required of a carrier towards a passenger.

It is difficult to determine the negligence of defendants. Plaintiff argues that by slowing down the speed of the car upon approaching the safety island, defendants extended an invitation to plaintiff and the other persons on the island to board the car.

and attempted to grab the center bar at the rear but the car picked up speed when she was struck by something. Other witnesses testified a man flipped the street car at the rear end at the eastern end of the island; that as the car passed the safety island it was moving all the time. Another witness testified that as the car slowed down before it reached the island a man jumped onto the step in the rear; that the speed seemed to throw his body away from the step and he knocked down three ladies who were on the island. Without detailing the testimony of the witnesses, it is established that a man who attempted to board the car as it was moving, knocked plaintiff down, from which she suffered injury.

There is no allegation of negligence in the construction or operation of the switch or bar. The evidence tends to show that the operation of the car was the usual and customary operation of the car at this time and place. As the car passed the island and approached the switch point the electrical power was off; people were standing on the island and up to the switch; as the car passed the island it was going about 5 miles an hour; that the car was coasting without power and slowed up and stopped right at the switch point, with the rear end of the car about 8 feet west of the safety island. It is a reasonable presumption that plaintiff, with others, went to the safety island expecting to board the slow moving car in order to get ahead of the crowd waiting to board the car at the regular stopping place opposite the switch.

It is not argued on behalf of plaintiff that she was a passenger on defendant's street car, and the jury was instructed, at her request, that it was the duty of defendant to exercise ordinary care and not the high degree of care required of a carrier towards a passenger.

It is difficult to determine the negligence of defendant. Plaintiff argues that by slowing down the speed of the car upon approaching the safety island, defendant extended an invitation to plaintiff and the other persons on the island to board the car.

Plaintiff cites in support of this Klinck v. Chicago City Ry. Co., 262 Ill. 280, 284, which holds that where a street car is brought almost to a stop at a place where it was the custom to receive and discharge passengers, there is an implied invitation to persons to board the car, but plaintiff's argument ignores the evidence that the island in the instant case was not the customary place to stop to receive passengers. No cases are cited holding that the slowing down of a street car at a place other than a regular stopping place is in itself an invitation to board while the car is in motion. Cases cited by plaintiff are not helpful. A typical one is Garlinski v. Chicago City Ry. Co., 257 Ill. App. 414, where the street car had come to a stop at a regular stopping place. The plaintiff there undertook to board the car at the same time the folding doors were closed, which caught his overcoat; the car then started and plaintiff was injured. These facts are quite different from those in the instant case.

Facts more nearly like those before us are in South Chicago City Ry. Co. v. Dufresne, 200 Ill. 456, 459-460, where the regular stopping place of the street car was just beyond a series of railroad tracks; a crowd was waiting to board the car and some of them climbed on before the car came to a stop; the car was running slowly and persons could board if they saw fit. But the court held it was not the business of the motorman to keep them off, nor the duty of the conductor; that to hold it was their duty would make the street car company "a guardian and protector of the public." The court also held that the fact the street car was compelled to pass over the railroad tracks slowly could not be construed as an invitation to passengers to board the car. So in the instant case the fact the Chicago avenue car was going slowly preparatory to making a stop could not be construed as an invitation to passengers to board it. In Spagnol v. Penn. R. Co., 279 Pa. 205, a boy jumped on a moving train and struck and knocked plaintiff down and she was injured. The court held the railroad was not negligent; that the proximate cause

Plaintiff cited in support of Miss Kline v. Chicago City Ry. Co., 282 Ill. 280, 284, which holds that where a street car is brought almost to a stop at a place where it was the custom to receive and discharge passengers, there is an implied invitation to persons to board the car, but plaintiff's argument ignores the evidence that the island in the instant case was not the customary place to stop to receive passengers. No cases are cited holding that the slowing down of a street car at a place other than a regular stopping place is in itself an invitation to board while the car is in motion. Cases cited by plaintiff are not helpful. A typical one is Garland v. Chicago City Ry. Co., 227 Ill. App. 414, where the street car had come to a stop at a regular stopping place. The plaintiff there undertook to board the car at the same time the folding doors were closed, which caught his overcoat; the car then started and plaintiff was injured. These facts are quite different from those in the instant case.

Facts more nearly like those before us are in South Chicago City Ry. Co. v. Dufrene, 203 Ill. 456, 459-460, where the regular stopping place of the street car was just beyond a series of railroad tracks; a crowd was waiting to board the car and some of them climbed on before the car came to a stop; the car was running slowly and persons could board if they saw fit. But the court held it was not the business of the motorman to keep them off, nor the duty of the conductor; that to hold it was their duty would make the street car company "a guardian and protector of the public." The court also held that the fact the street car was compelled to pass over the railroad tracks slowly could not be construed as an invitation to passengers to board the car. So in the instant case the fact the Chicago avenue car was going slowly preparatory to making a stop could not be construed as an invitation to passengers to board it. In Spagnol v. Penn. R. Co., 279 Pa. 205, a boy jumped on a moving train and struck and knocked plaintiff down and she was injured. The court held the railroad was not negligent; that the proximate cause

of the accident was the act of the boy in negligently boarding the train. In Brice v. South Covington & C. S. Ry. Co., 93 S. W. (Ky.) 37, the plaintiff was injured when two men, jumping on the bottom step of a moving car, struck her causing injuries. The court there held that plaintiff's injury was the result of the negligent and rash act of the men jumping on the car. In Busack v. Chicago City Ry. Co., 283 Ill. 117, and Kahlfeldt v. Busby, 272 Ill. App. 469, 473, it was held that the opening of the vestibule door by the motorman while the car was still in motion was not an invitation to a passenger to alight before the car came to a stop. Other cases to the same effect might be cited.

Defendants argue that the amount allowed by the jury for damages is excessive. We do not discuss this point as we are holding that the verdict of the jury upon the question of liability is against the manifest weight of the evidence and there must be another trial.

Criticism is made of plaintiff's given instruction on the question of damages which referred to the future loss of health of plaintiff. It is said there was no evidence as to future loss of health or future suffering. If this is true the error can be corrected upon another trial.

Complaint is made of the trial court's modification of defendants' tendered instruction No. 25 which recited the city ordinance making it unlawful for a person to board a street car while it is in motion. The instruction as tendered told the jury that if the evidence showed this was done [referring to the man who flipped on the car] and by reason thereof plaintiff was injured, and that if this violation was the proximate and direct cause of her injury, the verdict should be for defendants. The court inserted the words that if the jury believed this conduct on the part of the man so boarding the car "was negligence which" was the cause of the injury. The modification should not have been made. The party boarding the street car was not a party to the suit, and as said in Vol. 1,

of the accident was the act of the boy in negligently boarding the train. In Brice v. South Coastway & S. Ry. Co., 22 N. W. (Ky.) 37, the plaintiff was injured when two men, jumping on the bottom step of a moving car, struck her causing injuries. The court there held that plaintiff's injury was the result of the negligent and rash act of the men jumping on the car. In Harack v. Chicago City Ry. Co., 283 Ill. 117, and Kahlefeldt v. Wabash, 273 Ill. App. 433, 473, it was held that the opening of the vestibule door by the motorman while the car was still in motion was not an invitation to a passenger to alight before the car came to a stop. Other cases to the same effect are cited.

Defendants argue that the amount allowed by the jury for damages is excessive. We do not discuss this point as we are holding that the verdict of the jury upon the question of liability is against the manifest weight of the evidence and there must be another trial.

Criticism is made of plaintiff's given instruction on the question of damages which referred to the future loss of health of plaintiff. It is said there was no evidence as to future loss of health or future suffering. If this is true the error can be corrected upon another trial.

Complaint is made of the trial court's modification of defendant's tendered instruction No. 25 which recited the city ordinance making it unlawful for a person to board a street car while it is in motion. The instruction as tendered told the jury that if the evidence showed this was done [referring to the men who jumped on the car] and by reason thereof plaintiff was injured, and that if this violation was the proximate and direct cause of her injury, the verdict should be for defendants. The court inserted the words that if the jury believed this contact on the part of the men on boarding the car "was negligence which" was the cause of the injury. The modification should not have been made. The party claiming the street car was not a party to the suit, and as said in Vol. I,

Thompson on Negligence, §54, it is not necessary for the defendant, in a case where he is sued for an injury caused by the act of a third person, to give the plaintiff an action against such third person. To the same effect is Cavanaugh v. Centerville Block Coal Co., 131 Iowa, 700, 707.

Defendants complain of the admission of evidence with special reference to the testimony of Dr. Radzinski, testifying for plaintiff. The doctor merely testified he was of the opinion that plaintiff's excessive nervousness was due to the fall she received. We do not think the testimony was inadmissible.

We are of the opinion plaintiff failed to prove by the greater weight of the evidence that the so-called safety island was the customary and usual place for the street car to stop to permit passengers to board; that the evidence fails to prove sufficiently there was any negligence on the part of defendants' servants in the operation of the car which caused plaintiff's injuries.

For the reason that the verdict is manifestly against the weight of the evidence, the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

O'Connor, P.J., and Matchett, J., concur.

Thompson on Negligence, §24, it is not necessary for the defendant,

in a case where he is sued for an injury caused by the act of a third person, to give the plaintiff an action against such third person. To the same effect is Owens v. Owens, 100 Cal. 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Defendants' complaint of the admission of evidence with special reference to the testimony of Dr. Kadzinski, testifying for plaintiff. The doctor merely testified he was of the opinion that plaintiff's excessive nervousness was due to the fall she received. do not think the testimony was inadmissible.

We are of the opinion plaintiff failed to prove by the greater weight of the evidence that the so-called safety island was the customary and usual place for the street car to stop to permit passengers to board; that the evidence fails to prove sufficiently there was any negligence on the part of defendants' servants in the operation of the car which caused plaintiff's injuries.

For the reason that the verdict is manifestly against the weight of the evidence, the judgment is reversed and the case is

reversed.

REVEREND AND HONORABLE.

O'Connor, J., and Macdonald, J., concur.

41454

JOHN M. BRANSFIELD CO.,
a Corporation,

Appellant,

v.

BERTHA V. WILSON, et al.,
Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

309 I.A. 573

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Bertha V. Wilson and Charles J. Wilson, defendants, filed a petition in the Superior court asking that certain orders and decrees entered in the above entitled cause (a foreclosure proceeding) be quashed and set aside on the ground that these orders were entered contrary to an agreement of the parties. After hearing defendants' petition and the verified answer of the respondent, plaintiff, the court decreed that the orders and other matters sought to be vacated should be quashed and set aside, and from this order plaintiff appeals.

In February, 1938, there were pending in the Superior court of Cook county three causes: (1) An action in assumpsit by John M. Bransfield against Charles J. Wilson, which was numbered 368-8069; (2) The instant proceedings brought by plaintiff against defendants to foreclose a trust deed conveying real estate, which case was numbered 378-14728, and (3) An equity suit brought by Charles and Bertha Wilson to enjoin the prosecution of the foreclosure proceeding and for the appointment of a receiver of John M. Bransfield Co. This was numbered 388-1037.

On February 11, 1938, there was pending the defendants' exceptions to the master's report filed in the foreclosure suit - the instant suit. On that date the Wilsons, in case No. 388-1037, applied for injunctive relief to restrain the instant plaintiff from prosecuting the foreclosure suit and asking for a receiver for John M. Bransfield Co. On this date, after hearing, all of the parties to the three actions, by their respective counsel, with the sanction of the chancellor, initialed and approved an agreed order that no

11414

MR. JUSTICE ROBERT DREWITT THE OPINION OF THE COURT.

303 A-578

SUPERIOR COURT,
APPELLANT,
v.
BETHA V. WILSON, et al.,
Appellees.

JOHN M. BRANFIELD CO.,
a Corporation,
Appellant,

APPEAL FROM

Betha V. Wilson and Charles J. Wilson, Defendants, filed a petition in the Superior court asking that certain orders and decrees entered in the above entitled cause (a foreclosure proceeding) be quashed and set aside on the ground that these orders were entered contrary to an agreement of the parties. After hearing defendants' petition and the verified answer of the respondent, plaintiff, the court decreed that the orders and other matters sought to be vacated should be quashed and set aside, and from this order plaintiff appeals.

In February, 1938, there were pending in the Superior court of Cook county three causes: (1) An action in reassignment by John M. Branfield against Charles J. Wilson, which was numbered 388-8083; (2) The instant proceedings brought by plaintiff against defendants to foreclose a first deed conveying real estate, which case was numbered 372-1428, and (3) An equity suit brought by Charles and Betha Wilson to enjoin the prosecution of the foreclosure proceeding and for the appointment of a receiver of John M. Branfield Co. This was numbered 388-1037.

On February 11, 1938, there was pending the defendants' exceptions to the master's report filed in the foreclosure suit - the instant suit. On that date the Wilsons, in case No. 388-1037, applied for injunctive relief to restrain the instant plaintiff from prosecuting the foreclosure suit and asking for a receiver for John M. Branfield Co. On this date, after hearing, all of the parties to the three actions, by their respective counsel, with the sanction of the chancellor, initialed and approved an agreed order that no

action would be taken in the instant case (No. 37S-14728) until the issues in cause No. 38S-1037 were determined, and this agreed order was spread of record in this latter cause.

On the same day, February 11, 1938, in the instant cause (No. 37S-14728) - the foreclosure proceeding - the parties, through their attorneys, initialed and approved another order reciting that the hearing on the exceptions to the master's report should be continued generally, to be called up on five days' notice by either party, and that defendants, the Wilsons, or any other persons in possession pay plaintiff as rental \$40 a month until the further order of the court.

Subsequently, in June, 1939, the case was placed on the "No Progress Calendar" and publication of this call was made in the Chicago Daily Law Bulletin. This was pursuant to a general order of the executive committee of the Superior court pertaining to causes wherein no action had been taken within a certain time. Thereafter the instant cause was called from the "No Progress" call by a chancellor (not the one who entered the agreed order of February 11, 1938), who overruled the exceptions to the master's report, approved the report and entered a decree of foreclosure. January 23, 1940, the master's report of the sale was approved and a deficiency decree was entered against defendants, and on April 24, 1940, exception was issued for such deficiency. Defendants did not know of these proceedings until May 25, 1940, when the execution was served on them.

May 31, 1940, defendants filed their petition in the nature of a writ of error coram nobis pursuant to §72 of the Civil Practice act, and after hearing, the court vacated the decrees and orders as requested by defendants.

Defendants assert the cause was placed upon the "No Progress" call by accident or mistake by the clerk of the trial court, although, by the order of February 11, 1938 it was agreed that no proceedings were to be had in the cause until the issues in cause No. 38S-1037 were determined.

action would be taken in the instant case (No. 375-14723) until the issues in cause No. 338-1037 were determined, and this agreed order was spread of record in this latter cause.

On the same day, February 11, 1938, in the instant cause (No. 375-14723) - the foreclosure proceeding - the parties, through their attorneys, initiated and approved another order reciting that the hearing on the exceptions to the master's report should be continued generally, to be called up on five days' notice by either party, and that defendants, the Wilsons, or any other persons in possession pay plaintiff as rental \$40 a month until the further order of the court.

Subsequently, in June, 1938, the case was placed on the "No Progress Calendar" and publication of this call was made in the Chicago Daily Law Bulletin. This was pursuant to a general order of the executive committee of the Superior Court pertaining to causes wherein no action had been taken within a certain time. Thereafter the instant cause was called from the "No Progress" call by a chancellor (not the one who entered the agreed order of February 11, 1938), who overruled the exceptions to the master's report, approved the report and entered a decree of foreclosure. January 28, 1940, the master's report of the sale was approved and a deficiency decree was entered against defendants, and on April 24, 1940, exception was issued for such deficiency. Defendants did not know of these proceedings until May 25, 1940, when the execution was served on them. May 31, 1940, defendants filed their petition in the nature of a writ of error coram nobis pursuant to §78 of the Civil Practice Act, and after hearing, the court vacated the decrees and orders as requested by defendants.

Defendants assert the cause was placed upon the "No Progress" call by accident or mistake by the clerk of the trial court, although, by the order of February 11, 1938 it was agreed that no proceedings were to be had in the cause until the issues in cause No.

Such agreements have been enforced by our courts in many cases. In the old case of Gillespie v. Rout, 39 Ill. 247, where by consent of the parties the case there under consideration was to stand continued until the final hearing of a certain other case appealed to the Supreme court, it was held that by this agreement the cause stood continued from term to term. The court enforced the agreement, saying that such matters were within the equitable jurisdiction of courts over their judgments and such agreements must be given effect, "and to prevent either from obtaining an unfair advantage of the other, a court of law may vacate an order when unfairly obtained." In Coultas v. Green, 43 Ill. 277, the court held that when such an agreement was made it became a part of the record and the parties to it should be held to abide by its terms. In Krieger v. Krieger, 221 Ill. 479, 485, an order dismissing the bill was sustained on the ground it was entered by consent. In Paine v. Doughty, 251 Ill. 396, a decree entered by consent was sustained. See also Consaer v. Wisniewski, 293 Ill. App. 529. In Sundberg v. Matteson, 307 Ill. App. (abst.) 239, and Davis v. Sedman, 307 Ill. App. (abst.) 240, foreclosure decrees entered by stipulation were held valid and binding, and leave to appeal was denied by the Supreme court in the second of these cases.

The clerk should have noted on the records of the instant case the agreement of the parties that no further action should be taken in the suit until the issues in the other suit had been determined. Had this appeared the cause would not have been placed on the "No Progress" call. In Silverman v. Childs, 107 Ill. App. 522, like negligence of the clerk in failing to note that the cause was not on the regular calendar was sufficient ground for a writ of coram nobis and authorized the court to set aside the judgment at a subsequent term. Weil v. Mulvaney, 262 Ill. 195. The facts in Carstedt v. Mills Novelty Co., 298 Ill. App. 275, are like those now before us. In that case under an order of the executive com-

Such agreements have been entered by our courts in many cases. In the old case of Gillette v. Hunt, 52 Ill. 247, where by consent of the parties the case there under consideration was to stand continued until the final hearing of a certain other case appealed to the Supreme Court, it was held that by this agreement the cause stood continued from term to term. The court entered the agreement, saying that such matters were within the equitable jurisdiction of courts over their judgments and such agreements must be given effect, "and to prevent either from obtaining an unfair advantage of the other, a court of law may vacate an order when unfairly obtained." In Goulet v. Green, 45 Ill. 277, the court held that when such an agreement was made it became a part of the record and the parties to it should be held to abide by its terms. In Krieger v. Krieger, 221 Ill. 478, 485, an order dismissing the bill was sustained on the ground it was entered by consent. In Wells v. Doughty, 251 Ill. 396, a decree entered by consent was sustained. See also Gonsar v. Wisniewski, 298 Ill. App. 529. In Shubert v. Matteson, 307 Ill. App. (2d) 329, and Davis v. Sedman, 307 Ill. App. (2d) 240, foreclosure decrees entered by stipulation were held valid and binding, and leave to appeal was denied by the Supreme Court in the second of these cases.

The clerk should have noted on the records of the instant case the agreement of the parties that no further action should be taken in the suit until the issues in the other suit had been determined. Had this appeared the cause would not have been placed on the "No Progress" call. In Silverman v. Galida, 107 Ill. App. 528, the negligence of the clerk in failing to note that the cause was not on the regular calendar was sufficient ground for a writ of coram nobis and authorized the court to set aside the judgment at a subsequent term. Wells v. Mulvaney, 298 Ill. 193. The facts in Garstedt v. Miller Novelty Co., 298 Ill. App. 275, are like those now before us. In that case under an order of the executive com-

mittee a special chancery calendar was made up for call and such cases as were found to be "dead" would be dismissed; the case was called on this calendar and dismissed; however, when it was shown that it was pending before a master in chancery the trial court set aside the dismissal and this order was affirmed by the Appellate court, and leave to appeal to the Supreme court was denied. (299 Ill. App. xiv.)

These points made by plaintiff in opposition to the action of the chancellor are mainly technical and without merit. It is not true that the court always loses jurisdiction of a judgment after thirty days from the date the judgment is rendered. Judgments or orders which were improperly entered because of the negligence of the court officials or the lack of knowledge of the court of the facts of record are void and may be set aside at any time under §72 of the Civil Practice act. Errors of fact which would justify vacating a judgment are not limited to disability or incapacity of the parties. As we have seen, in none of the above cases cited supporting the orders of the chancellor was the disability of the parties in issue.

Defendants acted promptly upon being served with the execution on May 25, 1940. Their petition was filed May 31.

None of the propositions of law presented by plaintiff is applicable to the facts before us. The decree and orders appealed from are affirmed.

AFFIRMED.

O'Connor, P.J., and Matchett, J., concur.

mitted a special chancery calendar was made up for call and such cases as were found to be "dead" would be dismissed; the case was called on this calendar and dismissed; however, when it was shown that it was pending before a master in chancery the trial court set aside the dismissal and this order was affirmed by the Appellate court, and leave to appeal to the Supreme court was denied. (233)

Ill. App. xiv.)

These points made by plaintiff in opposition to the action of the chancellor are mainly technical and without merit. It is not true that the court always loses jurisdiction of a judgment after thirty days from the date the judgment is rendered. Judgments or orders which were improperly entered because of the negligence of the court officials or the lack of knowledge of the court of the facts of record are void and may be set aside at any time under §73

of the Civil Practice act. Errors of fact which would justify vacating a judgment are not limited to disability or incapacity of the parties. As we have seen, in none of the above cases cited supporting the orders of the chancellor was the disability of the parties in issue.

Defendants acted promptly upon being served with the execution on May 25, 1940. Their petition was filed May 31. None of the propositions of law presented by plaintiff is applicable to the facts before us. The decree and orders appealed from are affirmed.

CHANCERY, F. L., and MORTGAGE, J., concur.

41485

WILMA E. KINNEY,

Appellee,

v.

PHILIP C. LINDGREN, et al.,
Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

309 I.A. 573²

This cause has already been under consideration by this court and the Supreme court. See opinions in 296 Ill. App. 635; 300 Ill. App. 610, and 373 Ill. 415. The main facts are stated in each of these opinions and it is unnecessary to repeat them here. Plaintiff filed a complaint asking for an accounting by defendants and that they be ordered to pay her whatever might be found due.

A master's report was approved and defendants were directed to pay plaintiff \$12,284.13 and costs; defendants appealed to this court, which reversed the decree and remanded the cause. (296 Ill. App. 635.) The trial court denied plaintiff's motion to redocket the cause and for a new trial and entered a decree dismissing plaintiff's complaint. Plaintiff thereupon appealed to this court, which affirmed the decree in part, reversed it in part and remanded it with directions. (300 Ill. App. 610.) The Supreme court, granting leave to appeal, reversed the judgment of the Appellate and the trial courts and remanded the cause to the trial court for further proceedings. (373 Ill. 415.)

Upon filing the mandate with the trial court, plaintiff moved that the cause be redocketed and for the entry of a decree. Defendants objected on the ground no decree should be entered until a new trial was had, and certain of the defendants were refused leave to file an amendment to their answer and the chancellor entered the decree from which the present appeal is taken.

The question now presented is whether the Supreme court passed upon the merits of the controversy and decided every material issue involved, or does the opinion indicate that upon reversing and

WILLIAM A. BROWN

APPELLATE COURT

SECOND DIVISION

WILLIAM A. BROWN, et al.,
Plaintiffs,
vs.
JAMES A. BROWN, et al.,
Defendants.

ALL JUSTICE MEMORANDA DECIDED ARE FILED IN THE COURT.

3081A.573

This cause has already been under consideration by this court and the Supreme court. See opinion in 308 Ill. App. 635; 300 Ill. App. 610, and 373 Ill. 415. The main facts are stated in each of these opinions and it is unnecessary to repeat them here. Plaintiff filed a complaint asking for an accounting by defendants and that they be ordered to pay her whatever might be found due. A master's report was approved and defendants were directed to pay plaintiff \$13,384.13 and costs; defendants appealed to this court, which reversed the master and remanded the cause. 300 Ill. App. 635. The trial court denied plaintiff's motion to rehear the cause and for a new trial and entered a decree dismissing plaintiff's complaint. Plaintiff thereupon appealed to this court, which affirmed the decree in part, reversed it in part and remanded it with directions. (300 Ill. App. 610.) The Supreme court, granting leave to appeal, reversed the judgment of the appellate and the trial courts and remanded the cause to the trial court for further proceedings. (373 Ill. 415.)

Upon filing the mandate with the trial court, plaintiff moved that the cause be reheard and for the entry of a decree. Defendants objected on the ground no decree should be entered until a new trial was had, and certain of the defendants were refused leave to file an amendment to their answer and the chancellor entered the decree from which the present appeal is taken.

The question now presented is whether the Supreme court passed upon the merits of the controversy and decided every material issue involved, or does the opinion indicate that upon reversing and

remanding, defendants should be permitted to file subsequent amendments or introduce additional evidence and the case proceed to a retrial. In its opinion the Supreme court said:

"When a decree is reversed and the cause is remanded without specific directions, the judgment of the court below is entirely abrogated, and the cause stands there as if no trial had occurred. The trial court then has the same power over the record as it had before its judgment or decree was rendered. It may permit amendments to the pleadings or the introduction of further evidence, so long as such steps are not inconsistent with the principles announced by the court of review, and do not introduce grounds which did not exist at the original hearing. (Aurora and Geneva Railway Co. v. Harvey, 178 Ill. 477, 483.) When a judgment is reversed and the cause remanded with directions to proceed in conformity to the decision then filed, and it appears from the opinion that the grounds of reversal are of a character to be obviated by amendment of the pleadings or by the introduction of additional evidence, the trial court is bound to permit the cause to be redocketed and to permit such amendments and the introduction of further evidence on the new hearing."

The Supreme court held that when the cause was remanded to the trial court by the first opinion of this court, the trial court should have ordered the cause redocketed and permitted amendments and introduction of further evidence on the new hearing. The Supreme court held this court was in error in approving the action of the trial court in entering a decree without redocketing the cause for a new trial. The Supreme court reversed our judgment and the decree of the Superior court and the cause was remanded to the latter court "for further proceedings consistent with the views herein expressed."

Defendants argue the Supreme court held that the evidence which defendants introduced to support the contention that the plaintiff had ratified their acts was not sufficient. The opinion stated plaintiff could make no ratification until she attained her majority and had received a full and complete disclosure of the facts, with knowledge of her rights. It would seem to be clear from this language that defendants were entitled to amend their answer and to introduce additional evidence upon a new trial tending to show plaintiff had ratified the trustees' acts. It also appears from the opinion that the Supreme court held the trustees were bound to show the value of the securities purchased from their own company. This would indicate that defendants could introduce evidence as to these

remanding, defendants should be permitted to file subsequent amendments or introduce additional evidence and the case proceed to a

trial. In its opinion the Supreme court said:

"When a decree is reversed and the cause is remanded without specific directions, the judgment of the court below is entirely set aside, and the cause stands there as if no trial had occurred. The trial court then has the same power over the record as it had before the judgment or decree was rendered. It may permit amendments to the pleadings or the introduction of further evidence, as long as such steps are not inconsistent with the principles announced by the court of review, and do not introduce grounds which did not exist at the original hearing. (Anson and Geneva Railway Co. v. Harvey, 173 Ill. 477, 488.) When a judgment is reversed and the cause remanded with directions to proceed in conformity to the decision then filed, and it appears from the opinion that the grounds of reversal are of a character to be obviated by amendment of the pleadings or by the introduction of additional evidence, the trial court is bound to permit the cause to be repleaded and to permit such amendments and the introduction of further evidence on the new hearing."

The Supreme court held that when the cause was remanded to the trial court by the first opinion of this court, the trial court should have

ordered the cause repleaded and permitted amendments and intro-

duction of further evidence on the new hearing. The Supreme court

held this court was in error in approving the action of the trial

court in entering a decree without repleading the cause for a new

trial. The Supreme court reversed our judgment and the decree of

the Superior court and the cause was remanded to the latter court

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which defendants introduced to support the contention that the plain-

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plaintiff could make no ratification until she attained her majority

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introduce additional evidence upon a new trial tending to show plain-

tiff had ratified the trustees' acts. It also appears from the

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the value of the securities purchased from their own company. This

would indicate that defendants could introduce evidence as to these

values upon a new trial.

The general rule concerning the practice where a judgment is reversed and the cause remanded for further proceedings in conformity with the views expressed in the opinion is stated in Roggenbuck v. Breuhaas, 330 Ill. 294. It is there said (p. 298) that when a cause is remanded with directions to proceed in conformity with the opinion "and it appears from the opinion that the grounds of reversal are of a character to be obviated by subsequent amendment of the pleadings or the introduction of additional evidence, it is the duty of the trial court to permit the cause to be redocketed and then to permit amendments to be made and evidence to be introduced on the hearing just as if the cause was then being heard for the first time. It is only when the merits of the controversy and the ultimate rights of the parties are decided in a court of review that a reversal and remandment will deprive the court below of the right to allow amendments to the pleadings and hear other evidence." This rule of practice is also stated in Chickering v. Failes, 29 Ill. 294, 303; In re Estate of Maher, 210 Ill. 160, 164; City of Paxton v. Bogardus, 188 Ill. 72; West v. Douglas, 145 Ill. 164; Rodisch v. Moore, 257 Ill. 615, 620.

It should be noted that in the brief filed in the Supreme court counsel for plaintiff asked the court, on remanding, to direct the Superior court to enter a finding against the defendants for \$11,300 with interest. The fact that the Supreme court did not so order would indicate it was of the opinion the record would not warrant the entry of a decree upon the evidence then before it.

It might be added that the same reasons which moved the Supreme court to hold that the Superior court, when the cause was remanded by this court, was in error in refusing to retry the case, would apply with equal force to the present action of the chancellor in refusing to allow amendments and further evidence and to retry the cause.

values upon a new trial.

The general rule concerning the propriety of a judgment is reversed and the cause remanded for further proceedings in conformity with the views expressed in the opinion is stated in Winters v. Brown, 330 Ill. 294. It is there said (p. 304) that when a cause is remanded with directions to proceed in conformity with the opinion

"and it appears from the opinion that the grounds of reversal are of a character to be obtained by subsequent amendment of the pleadings or the introduction of additional evidence, it is the duty of the trial court to permit the cause to be reheard and then to permit amendments to be made and evidence to be introduced on the hearing just as if the cause was then being heard for the first time. It is only when the merits of the controversy and the ultimate rights of the parties are decided in a court of review that a reversal and remandment will deprive the court below of the right to allow amendments to the pleadings and hear other evidence." This rule of practice is also stated in Chickering v. Taylor, 32 Ill. 304, 305; In re Estate of Baker, 310 Ill. 120, 124; City of Chicago v. Boardman, 193 Ill. 78; West v. Connelley, 180 Ill. 184; Bohlsch v. Boardman, 187 Ill. 414, 415.

It should be noted that in the brief filed in the Supreme court counsel for plaintiff asked the court, on remand, to direct the Superior court to enter a finding against the defendant for \$1,300 with interest. The fact that the Supreme court did not so order would indicate it was of the opinion the record would not warrant the entry of a decree upon the evidence then before it. It might be added that the same reasons which would not

entirely court to hold that the Superior court, when the cause was remanded by this court, was in error in refusing to grant the case would apply with equal force to the present action of the Superior court in refusing to allow amendments and further evidence and to grant a new trial.

We hold that we are following the opinion of the Supreme court in reversing and remanding the present decree with directions to the Superior court to permit such amendments and further evidence as in the judgment of the chancellor seem proper, consistent with what is said in the opinion of the Supreme court, as above indicated.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P.J., and Matchett, J., concur.

We hold that we are following the opinion of the Supreme Court in reversing and remanding the present decree with directions to the Superior Court to permit such amendments and further evidence as in the judgment of the Chancellor seem proper, consistent with what is said in the opinion of the Supreme Court, as above indicated.

O'Connor, P.J., and Macdonald, J., concur.

41494

MARCIA MISHELOW,

Appellant,

APPEAL FROM

v.

SUPERIOR COURT,

GUY A. RICHARDSON and WALTER J.
CUMMINGS, as Receivers, etc.,
et al., doing business as
Chicago Surface Lines,
Appellees.

COOK COUNTY.

309 I.A. 574

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff sought to recover damages caused, as she alleged, by a fall while in the act of alighting from a street car operated by defendants; upon trial the verdict was for the defendants and she appeals from the judgment entered.

Only one issue of fact was presented to the jury. Did she fall while alighting from the car or afterward when she was on the street?

Plaintiff testified she was a passenger on a street car going west on Adams street which turned south on Racine to Harrison street; that the conductor told everybody to get off as that was the end of the run; that the car was standing still as her left foot was on the platform and her right foot stepping down; that the car then jerked and threw her to the ground. She testified that her ankle was swollen and she received medical treatment.

James Dolan, the motorman, testified for defendants that Harrison and Racine avenue was the end of the line for the west bound trip; that when he reached that point he brought the car to a dead stop; two passengers got off - a man and the plaintiff; that the car was standing still as she stepped off; as she stepped onto the street she turned her ankle and fell on her knee.

The conductor, John Murtaugh, testified they were changing crews at Racine and Harrison and the car was standing still; that plaintiff got off the front end of the car and stumbled while on the street and fell; that after the car stopped it was not moved for several minutes. There was other evidence that the car stood still

KANGIA MISHKOW,

BUY A. RICHMONDSON and
CUMMINGS, as Receivers,
of all, joint owners of
Chicago Surface Lines,
Appellants.

MR. JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

Plaintiff sought to recover damages caused, as she alleged, by a fall while in the act of alighting from a street car operated by defendants; upon trial the verdict was for the defendants and she appeals from the judgment entered.

Only one issue of fact was presented to the jury. Did she fall while alighting from the car or afterwards when she was on the street?

Plaintiff testified she was a passenger on a street car going west on Adams street which turned north on Racine to Harrison street; that the conductor told everybody to get off as that was the end of the run; that the car was standing still as her left foot was on the platform and her right foot stepping down; that the car then jerked and threw her to the ground. She testified that her ankle was swollen and she received medical treatment.

James Dolan, the motorman, testified for defendants that Harrison and Racine avenue was the end of the line for the west bound trip; that when he reached that point he brought the car to a stop; two passengers got off - a man and the plaintiff; that the car was standing still as she stepped off; as she stepped onto the street she turned her ankle and fell on her knee.

The conductor, John Kuntz, testified they were standing on the platform and Harrison and the car was standing still; that plaintiff got off the front end of the car and stepped onto the street and fell; that after the car stopped it was not moved for several minutes. There was other evidence that the car stood still

at the time.

Plaintiff's counsel in the brief attempt to discredit the motorman and the conductor, while counsel for defendants point out that plaintiff was financially interested in the result of the suit and the element of self-interest entered into her testimony. All of such matters were properly submitted to the jury, and we cannot say that the acceptance by the jury of defendants' theory that plaintiff fell after she had alighted from the car and not because of any movement of the car, is against the manifest weight of the evidence.

Counsel for plaintiff strongly argue it was reversible error to give at defendants' request instruction No. 11, which is as follows:

"You are instructed that the happening of the accident in question, in and of itself does not raise a presumption of any negligence on the part of the defendants."

Counsel for both parties have submitted much argument involving the question of whether this is a res ipsa loquitur case, and other refinements and distinctions of no value in determining the only question here presented. The instruction was useless in the present case, as the facts were so simple that it could not have misled the jury. As was well said in Funk v. Babbitt, 156 Ill. 408, 415-416, the test is not what the ingenuity of counsel can work out the instructions to mean, but how, in view of the evidence before them, men of ordinary intelligence would understand them.

Some complaint is made of the alleged misconduct upon the trial of attorney for defendants. There was some difference of opinion between respective counsel as to the length of time the car was delayed on account of the accident. One claimed the evidence showed 4 minutes, while his opponent claimed it was 5 minutes. The point was unimportant and the conduct of counsel with reference thereto would not demand a reversal.

We cannot say the verdict was against the weight of the evidence, and as there were no reversible errors upon the trial the judgment is affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and Matchett, J., concur.

at the time.

Plaintiff's counsel in the brief attempt to discredit the testimony of the defendant, while counsel for defendant point out that plaintiff was financially interested in the result of the suit and the element of self-interest entered into her testimony. All of such matters were properly admitted to the jury, and we cannot say that the acceptance by the jury of defendant's theory that plaintiff felt after she had alighted from the car and not because of any movement of the car, is against the manifest weight of the evidence.

Counsel for plaintiff strongly argue it was reversible error to give at defendant's request instruction No. 11, which is as follows:

"You are instructed that the happening of the accident in question, in and of itself, does not constitute negligence on the part of the defendant."

Counsel for both parties have submitted much argument involving the question of whether this is a res ipsa loquens case, and other relevant elements and distinctions of no value in determining the only question here presented. The instruction was useful in the present case, as the facts were so simple that it could not have misled the jury. As was well said in Funk v. Ebbett, 158 Ill. 408, 418-419, the test is not what the ingenuity of counsel can work out for the instructions to mean, but how, in view of the evidence before them, men of ordinary intelligence would understand them.

Some complaint is made of the alleged misconception upon the trial of attorney for defendant. There was some difference of opinion between respective counsel as to the length of time the car was delayed on account of the accident. One claimed the evidence showed 4 minutes, while his opponent claimed it was 5 minutes. The point was unimportant and the conduct of counsel with reference thereto would not demand a reversal. We cannot say the verdict was against the weight of the evidence, and as there were no reversible errors upon the trial the judgment is affirmed.

APPROVED AND FORWARDED:

CLARENCE M. BROWN, J., CLERK.

41586

CHARLES E. LOY,

Appellee,

APPEAL FROM

v.

CIRCUIT COURT,

OTTO H. KNAAK,

Appellant.

COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

309 I.A. 574²

Defendant appealed to the Supreme court from an order of the Circuit court denying his motion to vacate and set aside a sheriff's sale of real estate, arguing that the notice of sale was not published in a secular newspaper of general circulation as required by §5, ch. 100, Ill. Rev. Stats. 1939. The Supreme court, holding that no freehold was involved, transferred the cause to this court. (373 Ill. 481.)

It was stipulated that the Southtown Economist, in which the notice of sale was published, was founded in 1906 and is and has at all times been published in the English language; the publication is owned by the Southtown Economist, an Illinois corporation, and is published at 728 West 65th street, Chicago. Copies of the publication are in evidence, showing that the first page is devoted to general and local news; one or more pages are devoted to sport; there is an editorial page and the paper contains social, club and lodge news; in the Sunday issue a portion of the publication is devoted to an expression of the ideas of the readers; it also contains a war veterans column, church news, classified and display advertisements. In 1938, in a contest for general excellence in a certain metropolitan newspaper district, the Southtown Economist was awarded first place as winner, and in 1939, was awarded winner in an editorial contest for outstanding service to the community.

For the past two years it has maintained an office in the down town loop district of Chicago and has accepted legal notices and published notices of sheriff's sales, foreclosures and all other types of legal notices; it has an average weekly circulation of

CIRCUIT COURT

OTTO H. ...

Defendant appealed to the Supreme Court from an order of the Circuit Court denying his motion to vacate and set aside a sheriff's sale of real estate, arguing that the notice of sale was not published in a secular newspaper of general circulation as required by Ill. Ch. 100, Ill. Rev. Stat. 1939. The Supreme Court, holding that no freehold was involved, transferred the cause to this court. (480 Ill. 481.)

It was stipulated that the Southtown Economist, in which the notice of sale was published, was printed in both an English and an all times been published in the English language; the publication is owned by the Southtown Economist, an Illinois corporation, and is published at 728 West 68th Street, Chicago. Copies of the publication are in evidence, showing that the first page is devoted to general and local news; one or more pages are devoted to sports; there is an editorial page and the paper contains social, club and lodge news; in the Sunday issue a portion of the publication is devoted to an expression of the ideas of the readers; it also contains a war veterans column, church news, classified and display advertisements. In 1938, in a contest for general excellence in a certain national newspaper district, the Southtown Economist was awarded first place as winner, and in 1939, was awarded winner in an editorial contest for outstanding service to the community.

For the past two years it has maintained an office in the downtown loop district of Chicago and has received legal notices and published notices of sheriff's sales, foreclosures and all other types of legal notices; it has an average weekly circulation of

70,500 for each issue and circulates among all classes; it is distributed from various news stands in the city and in the down town loop business district from the down town office; it also has a number of subscribers to whom it is sent by mail.

Defendant relies principally upon the fact that a large percentage of the circulation is on the south side of Chicago. In the recent case of People v. Dearborn St. Bldg. Corp., 372 Ill. 459, it was held that by the words "general circulation" in the act referred to, the legislature intended to describe a newspaper of general as distinguished from one of a special or limited character. That case involved the publication of legal notices in the Daily Calumet, a newspaper with an average daily circulation of 6,000 copies, largely in three or four wards in Chicago. It was held that it had all the qualifications for publication purposes required by the statute. The decision in that case disposes of the points made by defendant.

Moreover, defendant does not allege or show that any injustice has resulted to him because of the publication of the notice of sale in the Southtown Economist.

The order of the trial court is affirmed.

ORDER AFFIRMED.

O'Connor, P.J., and Matchett, J., concur.

70,500 for each issue and circulation among all classes; it is distributed from various news stands in the city and in the down town loop business district from the down town office; it also has a number of subscribers to whom it is sent by mail.

Defendant relies principally upon the fact that a large percentage of the circulation is on the south side of Chicago. In the recent case of People v. Pearson & Co., 233 Ill. 432, it was held that by the words "general circulation" in the act referred to, the legislature intended to describe a newspaper of general as distinguished from one of a special or limited character. That case involved the publication of legal notices in the Daily Calumet, a newspaper with an average daily circulation of 8,000 copies, largely in three or four hands in Chicago. It was held that it had all the qualifications for publication purposes required by the statute. The decision in that case disposes of the points made by defendant.

Moreover, defendant does not allege or show that any injustice has resulted to him because of the publication of the notice of sale in the Southtown Economist. The order of the trial court is affirmed.

O'Connor, P.J., and McChesney, J., concur.

41565

DR. HOMER W. WARREN,

Appellant,

v.

C. J. SUPERNAND and HAZEL SUPERNAND,
Appellees.

APPEAL FROM

MUNICIPAL COURT,

OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff, a licensed physician, sued defendants (husband and wife) to recover the reasonable value of professional services rendered by him to Mrs. Supernand's mother, Lena Stevens. There was a statement of claim with affidavit of merits by defendants denying liability, trial by the court and a finding against C. J. Supernand in the sum of \$75 with judgment. As to defendant Hazel Supernand the finding was for defendant. Plaintiff appeals.

It is urged the finding is clearly and manifestly against the weight of the evidence; that the judgment should be reversed and judgment entered in this court for the full amount claimed, \$552. Wheaton v. Johnson, 55 Ill. App. 53, is relied upon.

The evidence shows Mrs. Supernand's mother, Mrs. Lena Stevens, lived with defendants. She became ill July 7, 1939, and Mrs. Supernand called plaintiff to attend her. July 8, she was taken to a hospital and an X-ray obtained, after which she returned to the home of defendants. In the month of July plaintiff made five calls for which he charged and was paid \$4 each. There were four other calls for which he charged and was paid \$5 each. Payments were made by C. J. Supernand. Mr. Supernand also paid to plaintiff \$5 for the X-ray. Plaintiff testified (defendants do not deny) that both asked him to furnish necessary services to Mrs. Stevens and said they would pay for the services.

August 8, Mrs. Stevens was again taken ill. Plaintiff was called and recommended hospitalization. She was taken to the American Hospital where plaintiff attended her. A private room was provided. August 12, after consultation with Dr. Thorsgaard and

DR. HOMER W. STEVENS

MUNICIPAL COURT

OF CHICAGO

C. J. STEVENS vs. HOMER W. STEVENS

THE JUSTICE NATIONAL BANK AND TRUST COMPANY OF NEW YORK

Plaintiff, a licensed physician, and defendant (appellee)

and wife) to recover the reasonable value of professional services rendered by him to Mrs. Supermund's mother, Jess Stevens. There was a statement of claim with affidavit of merits by defendants denying liability, trial by the court and a finding against C. J. Supermund in the sum of \$75 with judgment. As to defendant Hazel Supermund the finding was for defendant. Plaintiff appeals. It is urged the finding is clearly and manifestly against the weight of the evidence; that the judgment should be reversed and judgment entered in this court for the full amount claimed, \$532. Weston v. Johnson, 55 Ill. App. 52, is relied upon.

The witness above the defendant's mother, Mrs. Jess

Stevens, lived with defendants. She became ill July 7, 1922, and Mrs. Supermund called plaintiff to attend her. July 8, she was taken to a hospital and an X-ray obtained, after which she returned to the home of defendants. In the month of July plaintiff made five calls for which he charged and was paid \$4 each. There were four other calls for which he charged and was paid \$5 each. Payments were made by C. J. Supermund. Mr. Supermund also paid to plaintiff \$5 for the X-ray. Plaintiff testified (defendants do not deny) that both asked him to furnish necessary services to Mrs. Stevens and said they would pay for the services.

August 8, Mrs. Stevens was again taken ill. Plaintiff and

called and recommended hospitalization. She was taken to the American Hospital where plaintiff attended her. A private room was provided. August 12, after consultation with Dr. Thompson and

with consent of defendants, a major operation was performed. The patient remained in plaintiff's charge and he was in attendance on her until 10:00 P.M. on August 13, when she died.

Plaintiff filed a bill of particulars showing items in the total amount claimed of \$552. The bill discloses charges for four calls at the hospital, \$3 each; a "midnite" call, \$6; charge for the operation, \$300; for "attendance", \$25; for the transfusion of blood, \$100; for attendance on August 13, and up to the time of the patient's death, \$70. Other items are for calls on the patient and one of \$3 when Mrs. Supernand called at plaintiff's office to inquire about her mother.

Plaintiff and Dr. Greenspahn testified the charges were usual, customary and reasonable. Dr. Greenspahn also gave testimony tending to disprove the claim of Mrs. Supernand that the administration of oxygen to the patient had been done in an unskillful way. No expert testimony either as to charge for services or lack of skill was offered by either of defendants. C. J. Supernand did not testify. By agreement the hospital record was put in evidence. Neither attendants nor Dr. Thorsgaard were called.

Under the evidence we hold liability incurred rested upon both defendants. This is manifest from the circumstances and testimony of plaintiff not denied. The record contains memorandums made by plaintiff showing the date and kinds of particular services rendered by him. Dr. Greenspahn said, "There are no definite or fixed charges." He said the charges were fair, ordinary and reasonable. He further testified that sometimes no charge would be made because of the poverty of the patient; in some instances he had charged as high as \$5000 for similar operations.

Disclaiming expert knowledge the court has been impressed by a bill received by defendants after completion of these services. A copy is in evidence. It is dated "August 25," is on stationery of plaintiff, "For professional services rendered Mrs. Lena Stevens." It was rendered and received after her death. The whole amount of

with consent of defendant, a major operation was performed. The patient remained in plaintiff's charge and he was in attendance on her until 10:00 P.M. on August 18, when she died.

Plaintiff filed a bill of particulars showing items in the total amount claimed of \$582. The bill discloses charges for four calls at the hospital, \$5 each; a "night" call, \$5; charge for the operation, \$300; for "attendance", \$25; for the transportation of blood, \$100; for attendance on August 18, and up to the time of the patient's death, \$70. Other items are for calls on the patient and one of \$3 when Mrs. Supermund called at plaintiff's office to inquire about her mother.

Plaintiff and Dr. Greenbaum testified the charges were usual, customary and reasonable. Dr. Greenbaum also gave testimony tending to disprove the claim of Mrs. Supermund that the administration of oxygen to the patient had been done in an unskillful way. No expert testimony either as to charges for services or lack of skill was offered by either of defendants. G. U. Supermund did not testify. By agreement the hospital record was put in evidence. Neither attendants nor Dr. Thompson were called.

Under the evidence we hold liability incurred rested upon both defendants. This is manifest from the circumstances and that many of plaintiff not denied. The record contains memoranda made by plaintiff showing the date and kind of particular services rendered by him. Dr. Greenbaum said, "There are no definite charges." He said the charges were fair, ordinary and reasonable. He further testified that sometimes no charge would be made because of the poverty of the patient; in some instances he had charged as high as \$500 for similar operations.

Disclaiming expert knowledge the court has been impressed by a bill received by defendant after completion of these services. A copy is in evidence. It is dated "August 18," is an attestation of plaintiff, "For professional services rendered Mrs. Lena Stevens." It was rendered and received after her death. The whole amount of

the bill is \$284. This bill was exhibited to plaintiff. He identified it as a regular invoice bearing his name and addressed to defendants for professional services rendered to the mother of defendant for \$284. Plaintiff said he never saw the exhibit before; that he did not recall it or recall that it was at any time forwarded to defendants. Further, that he had no knowledge as to who prepared the exhibit.

We hold the amount plaintiff may recover is limited to \$284. We find there is due from both defendants to plaintiff said sum. The judgment of the trial court will be reversed and judgment entered in this court for plaintiff and against both defendants for \$284.

REVERSED WITH FINDING OF FACT AND
JUDGMENT IN THIS COURT IN FAVOR OF
DR. HOMER W. WARREN AND AGAINST
C. J. SUPERNAND AND HAZEL SUPERNAND
FOR \$284.

O'Connor, F.J., and McSurely, J., concur.

the bill is \$284. This bill was exhibited to Plaintiff. He identified it as a regular invoice bearing his name and addressed to the tenants for professional services rendered to the mother of defendant and for \$284. Plaintiff said he never saw the exhibit before; that he did not recall it or recall that it was at any time forwarded to defendant. Further, that he had no knowledge as to who prepared

the exhibit.

We hold the amount Plaintiff may recover is limited to \$284. We find there is due from both defendants to Plaintiff said sum. The judgment of the trial court will be reversed and judgment entered in this court for Plaintiff and against both defendants for

same.

REVEREND WITH FINDING OF FACT AND JUDGMENT IN THIS COURT IN FAVOR OF DR. HOWARD W. FARRIS AND AGAINST U. J. SUPERMAN AND HAZEL SUPERMAN FOR \$284.

Given under my hand and seal of the Court at Chicago, Illinois, this 1st day of November, 1934.

41595

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

JOHN WILLIAMS, alias JOHN COOPER,
Plaintiff in Error.

WRIT OF ERROR TO

MUNICIPAL COURT

OF CHICAGO.

2

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

July 11, 1940, defendant, John Williams (known also as John Cooper) was arrested on the complaint of Katherine Boyer, who charged he was guilty of the crime of pandering, contrary to §170, ch. 38 of the Criminal Code. Defendant was arrested without warrant, arraigned, pleaded not guilty, waived trial by jury, was tried by the court with a finding of guilty in manner and form as charged. Motions for a new trial and in arrest were denied, and there was judgment on the finding that defendant be fined \$300 and costs and sentenced to serve one year in the House of Correction. He has sued out this writ of error.

The specific charge made was that on March 28, 1940, in the city of Chicago, without lawful consideration, defendant accepted from the complaining witness \$18 with knowledge that it was part of her earnings from the practice of prostitution.

The evidence shows beyond reasonable doubt that Katherine Boyer at the time of the alleged offense and for many years prior thereto, in St. Louis, Missouri and in Chicago, Illinois, lived by such practice. She is now about thirty-five years of age. She first met defendant in St. Louis, when she was about twenty-five years old and he only seventeen years of age. Williams and his mother took two rooms on the second floor of a building in which Katherine Boyer occupied a room on the first floor. Afterwards the three took rooms together in a different building, and there Katherine Boyer and John Williams soon began an illicit life together. In 1933, they came to Chicago. The relationship begun in

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

JAMES WILLIAMS, alias JOHN COOPER,
Plaintiff in Error.

THE JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

July 11, 1940, defendant, John Williams (known also as John Cooper) was arrested on the complaint of Katherine Boyer, who charged he was guilty of the crime of pandering, contrary to §170, ch. 38 of the Criminal Code. Defendant was arrested without warrant, arraigned, pleaded not guilty, waived trial by jury, was tried by the court with a finding of guilty in manner and form as charged. Motions for a new trial and in arrest were denied, and there was judgment on the finding that defendant be fined \$300 and costs and sentenced to serve one year in the House of Correction. He has since out this writ of error.

The specific charge made was that on March 23, 1940, in the city of Chicago, without lawful consideration, defendant associated from the complaining witness his wife with knowledge that it was part of her earnings from the practice of prostitution.

The witness stated that she met defendant at the time of the alleged offense and for many years prior thereto, in St. Louis, Missouri and in Chicago, Illinois, lived in such practice. She is now about thirty-five years of age. The first met defendant in St. Louis, when she was about twenty-five years old and he only seventeen years of age. Williams and his mother took two rooms on the second floor of a building in which Katherine Boyer occupied a room on the first floor. Defendant and three took rooms together in a different building, and when Katherine Boyer and John Williams soon began an illicit life together. In 1933, they came to Chicago. The relationship began in

St. Louis was continued here. She earned the money; he helped her spend it. She says, "I used to go on the street and hustle."

She testified that March 28, 1940, she made \$18 from the practice of her profession, and that she gave this money to defendant. It was not the only money of this kind she had given to him. Sometimes he would use the money to pay her bills, for shoes, clothes and other necessities. During the time they lived together seven automobiles were bought by money thus earned. Four of these were bought in her name, the others in his. She was accustomed to rent a room where her business was practiced. Defendant would drive her to the room and bring her away from it. He also kept a lookout for the police in her behalf. She discussed the details of her conduct with him. On May 3, 1937, defendant ceased living with her leaving his clothes in her apartment.

Sometime prior to May 14, 1937, his thoughts seemed to have turned toward another and younger woman. Both wished to have him. They fought and the older sustained a broken leg which sent her to the hospital. Unable to win him back from his new mistress she sought the police and caused him to know something of the fury of a woman's scorn. There is no doubt her desire for vengeance is the cause of this prosecution.

General denials by him do not raise a reasonable doubt of his guilt. He had no remunerative employment. He says that in St. Louis he was at one time employed in a candy shop. He has had no similar employment since coming to Chicago. When the State's Attorney asked defendant if he knew the prosecuting witness was a prostitute, if he knew how she made her living, defendant's counsel objected in his behalf and the court (erroneously, we hold) sustained the objections. Asked if he ever had a job in Chicago he said, "Yes, I have worked in bookies, playing poker." From the standpoint of the law there is no doubt whatever of defendant's guilt however much by way of extenuation might be said in his behalf on account of the environment into which he was born.

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spend it. She says, "I used to go on the street and prostitute."

St. Louis was continued here. She earned the money; he helped her

Technicalities are urged for reversal. Defendant, his mother and his new mistress were arrested at the same time without warrant. The two women were discharged. It is urged in defendant's behalf that the arrest without warrant was illegal and a motion made in his behalf that he be discharged should have been granted. The cases hold an officer has a right to arrest without a warrant if he has reasonable grounds for believing a defendant has committed a crime and if an offense has been actually committed. (See the Criminal Code, §657.) These people were well known to the police. They were living lives of crime. The judgment of the trial court (which we must affirm) shows an offense in fact had been committed. The officer testified (and his testimony is not denied) that prior to making the arrest he heard the women in the apartment discussing the methods they were presently to use in their unlawful conduct on the street. We hold there was no error in denying the motion. People v. Kissane, 261 Ill. App. 621, (affirmed in 347 Ill. 385); People v. Doody, 343 Ill. 194.

The women who were arrested were charged with disorderly conduct in violation of a city ordinance. A motion was made to grant defendant a separate trial since the alleged violations of the ordinance were unrelated to the offense charged in the information. The record shows the cases against these two women were dismissed prior to the beginning of the trial of defendant; that the trial judge then asked if defendant was ready for trial and his counsel in his presence said that he was. There was no error in the ruling nor damage to his defense.

It is urged the evidence failed to prove beyond a reasonable doubt that defendant had knowledge how the money was earned and it is contended a conviction should not be upheld upon the testimony of a single witness. Neither the testimony of the prosecuting witness nor of defendant is entitled to much consideration except as it is corroborated by undisputed facts and circumstances disclosed by the record. In cases where there is a jury the question of fact is

Technicalities are urged for reversal. Defendant, his mother and his new mistress were arrested at the same time without warrant. The two women were discharged. It is urged in defendant's behalf that the arrest without warrant was illegal and a motion made in this behalf that he be discharged should have been granted. The state holds an officer has a right to arrest without a warrant if he has reasonable grounds for believing a defendant has committed a crime and if an offense has been actually committed. (See the Criminal Code, § 857.) These people were well known to the police. They were living lives of crime. The judgment of the trial court (which we must affirm) shows an offense in fact had been committed. The officer testified (and his testimony is not denied) that prior to making the arrest he heard the women in the apartment discussing the methods they were presently to use in their unlawful conduct on the street. We hold there was no error in denying the motion. People v. Krasane, 381 Ill. App. 621, (affirmed in 387 Ill. 385); People v. Lopez, 384 Ill. 181.

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It is urged the evidence failed to prove beyond a reasonable doubt that defendant had knowledge how the money was earned and it is contended a conviction should not be upheld upon the testimony of a single witness. Neither the testimony of the prosecuting witness nor of defendant is entitled to such consideration except as it is corroborated by undisputed facts and circumstances disclosed by the record. In cases where there is a jury the question of fact is

always for the jury. People v. Martin, 304 Ill. 494. Where, as here, the trial is before the court without a jury, the trial judge, who saw and heard the witnesses, had opportunity of observing their conduct and demeanor, is in a much better position to weigh the testimony than a reviewing court, and his finding is entitled to the same weight as a verdict. People v. Bolger, 359 Ill. 58. We are not unmindful of the rule this court should not allow a criminal conviction to stand where there is a reasonable doubt of guilt. On this whole record no such doubt arises. It is urged this was a prosecution for a particular crime and that evidence inadmissible as tending to show the commission of another and different crime was not admissible. It is said such evidence was received. There is no question of the rule of law in this respect. Defendant complains that in violation of this rule officer Conrad was permitted to testify as to what the complaining witness had told him about her living with defendant and, in particular, that she had lived with him in St. Louis, Missouri, in 1932, and also that she told of many occasions upon which he was guilty of taking her money. The officer was called as a witness by defendant in an attempt to show there were no reasonable grounds for arresting defendant. Defendant objected to some of the questions by the State's Attorney on cross-examination. We hold the questions were pertinent to the inquiry as to circumstances under which the arrest was made. The other matters of which defendant complains were admissible for the purpose of showing the relationship of the parties. There was no proof given of distinct and unrelated crimes. While it is undoubtedly true on a trial before the court of a criminal case all incompetent evidence should be rejected, we think there was none in this case which can be held to be prejudicial. The proof of guilt was overwhelming. As a matter of fact, as we have already stated, the rulings of the court as to the admission of evidence, particularly

always for the jury. People v. Martin, 304 Ill. 494. Where, as here, the trial is before the court without a jury, the trial judge, who saw and heard the witnesses, had opportunity of observing their conduct and demeanor, is in a much better position to weigh the testimony than a reviewing court, and his finding is entitled to the same weight as a verdict. People v. Bolger, 359 Ill. 59. We are not unmindful of the rule this court should not allow a criminal conviction to stand where there is a reasonable doubt of guilt. On this whole record no such doubt arises. It is urged this was a prosecution for a particular crime and that evidence inadmissible as tending to show the commission of another and different crime was not admissible. It is said such evidence was received. There is no question of the rule of law in this respect. Defendant complains that in violation of this rule officer Connel was permitted to testify as to what the complaining witness had told him about her living with defendant and, in particular, that she had lived with him in St. Louis, Missouri, in 1932, and also that she told of many occasions upon which he was guilty of taking her money. The officer was called as a witness by defendant in an attempt to show there were no reasonable grounds for arresting defendant. Defendant objected to some of the questions by the State's Attorney on cross-examination. We hold the questions were pertinent to the inquiry as to circumstances under which the arrest was made. The other matters of which defendant complains were admissible for the purpose of showing the relationship of the parties. There was no proof given of distinct and unrelated crimes. While it is undoubtedly true on a trial before the court of a criminal case all incompetent evidence should be rejected, we think there was none in this case which can be held to be prejudicial. The proof of guilt was overwhelming. As a matter of fact, as we have already stated, the rulings of the court as to the admission of evidence, particularly

upon the cross-examination of defendant, were much more favorable to him than the law required.

It is urged that the examination of officer Conrad and the complaining witness, Katherine Boyer, was improper because of leading questions asked and it is said defendant thereby did not receive the fair and impartial trial guaranteed by the Constitution of the state. People v. Schladweiler, 315 Ill. 553, 146 N. E. 525, is cited with People v. Blockburger, 354 Ill. 301. The matters of which complaint is made for the most part concern things about which there was little if any, dispute. While in a case of this kind the prosecuting witness should not be led, we hold there was no reversible error in this respect.

It is urged that defendant was not represented by experienced and competent counsel and cases such as People v. Nitti, 312 Ill. 73, 143 N. E. 448, and People v. Nowak, 372 Ill. 381, are cited. These cases are not applicable. There is nothing in this record from which it can be inferred that defendant's counsel was incompetent or inexperienced, and he was chosen by defendant himself. We are aware under the law of this state there are not two ways of trying criminal cases, one for the guilty and the other for those that are not guilty. Each and every defendant is entitled to a fair and impartial trial. We hold defendant has had such a trial.

It is finally urged that that part of the judgment which ordered defendant to work out the fine and costs should be reversed since it is said it appears from the record that that part of the judgment order was inserted by the clerk in making up the transcript of the record without authority. The record in this case was filed in this court by the plaintiff in error. It is properly certified. We find in it no basis for the contention made. The judgment will be affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and McSurely, J., concur.

upon the cross-examination of defendant, was such cross-examination as him then the law required.

It is urged that the examination of Officer Gorman and the complaining witness, Katherine Boyer, was improper because of leading questions asked and it is said defendant thereby did not receive a fair and impartial trial guaranteed by the Constitution of the State. People v. Blockmeyer, 224 Ill. 301. The matters of which complaint is made for the most part concern things about which there was little if any dispute. While in a case of this kind the prosecuting witness should not be led, we hold there was no reversible error in this respect.

It is urged that defendant was not represented by counsel and competent counsel and cases such as People v. Riffe, 212 Ill. 78, 143 N. E. 448, and People v. Lewis, 272 Ill. 321, are cited. These cases are not applicable. There is nothing in this record from which it can be inferred that defendant's counsel was incompetent or inexperienced, and he was chosen by defendant himself. He was sworn under the law of this state there are not two ways of trying criminal cases, one for the guilty and the other for those that are not guilty. Each and every defendant is entitled to a fair and impartial trial. We hold defendant has had such a trial.

It is finally urged that that part of the judgment which ordered defendant to work out the fine and costs should be reversed since it is said it appears from the record that that part of the judgment order was inserted by the clerk in making up the transcript of the record without authority. The record in this case was filed in this court by the plaintiff in error. It is properly certified. We find in it no basis for the contention made. The judgment will

be affirmed.

FORNARD WITNESS.

FORNARD, J., and ...

41338

BENJAMIN D. RITHOLZ, MORRIS I.
RITHOLZ, SAMUEL J. RITHOLZ et al.,
Appellees,

v.

THOMAS ANDERT, W. REETZ, R. PARGUS
et al.,
Defendants.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

BENJAMIN E. COHEN,
Petitioner,

v.

EARL DISSELHORST,
Appellant.

3091A.576

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In August, 1937, the plaintiffs, Benjamin D. Ritholz, Morris I. Ritholz, Samuel J. Ritholz and others, filed a complaint in chancery against Thomas Andert, Earl Disselhorst and others, who were members of a labor union employed by plaintiff, seeking an injunction against defendants as well as other relief. The issues involved in that proceeding are fully set forth in Ritholz v. Andert, 303 Ill. App. 61. Pursuant to the filing of the complaint plaintiffs had procured a temporary restraining order against defendants. Thereafter, in October, 1937, at plaintiffs' own request, defendants' motion to dissolve the temporary injunction was referred to Benjamin E. Cohen, a master in chancery. A few days later, by agreement of all the parties, another order was entered which referred the entire cause on its merits to the master.

At the initial hearing before the master, the parties entered into the following stipulation, as appears from the record in the original proceeding: "It is further agreed by counsel for the plaintiffs that all of the plaintiffs will pay all the master's and stenographic costs incurred in this hearing to be taxed as costs." After extensive hearings, the master prepared his report, dated April 14, 1938, consisting of thirty-seven pages and predicated upon a record

BENJAMIN D. NICHOLS, JR.
SAMUEL T. NICHOLS, JR.
Appellants

v.

THOMAS ANDERT, W. NICHOLS, JR.
Respondents

v.

GARY DISCHENHOF, Appellant.

MR. PRESIDING JUSTICE THOMAS ANDERT, for the Court.

In August, 1937, the plaintiffs, Benjamin D. Nichols,

Morris I. Nichols, Samuel T. Nichols and others, filed a complaint

in chancery against Thomas Andert, Earl Manchester and others,

who were members of a labor union employed by plaintiff, seeking

an injunction against defendants as well as other relief.

Issues involved in that proceeding are fully set forth in Bill of

v. Andert, 303 Ill. App. 61, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025.

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graphic costs incurred in this hearing to be taxed as costs."

extensive hearings, the master rendered his report, which was

1937, consisting of thirty-seven pages and in which he

of almost 900 pages, finding the issues in favor of the defendants and recommending that the suit be dismissed for want of equity. Appended to his report was an itemized certificate of the master's fees and charges, requesting an allowance of \$1,484.60, together with a recommendation that this amount be taxed against plaintiffs, in accordance with their stipulation.

June 6, 1938, a decree was entered which confirmed the master's report in all respects. The temporary injunction procured by plaintiffs was dissolved, and their complaint was dismissed for want of equity. The decree inadvertently contained no provision concerning master's fees, and was entirely silent as to the taxation of costs. A prior decree had been presented to the chancellor, making extensive findings of fact and containing provisions for the taxing of costs and master's fees. The chancellor was rightfully of opinion, however, that it was unnecessary under the Practice Act to include findings of fact in the decree, and directed the attorneys for defendants to present a short decree. Accordingly, the decree of June 6, 1938, was presented, which merely recited that the court had jurisdiction of the subject matter and the parties to the proceeding, that the objections and exceptions filed by plaintiffs to the master's report be overruled, that "the report of Benjamin E. Cohen, master in chancery of this court, be and the same is hereby in all respects approved and confirmed," that the temporary injunction theretofore entered be dissolved, and that the complaint as supplemented and amended be dismissed for want of equity. That decree was subsequently affirmed in Ritholz v. Andert, 303 Ill. App. 61, and leave to appeal to the Supreme court was denied during the April 1940 term. (Ritholz v. Andert, 303 Ill. App. xvii.)

On February 20, 1940, the master filed a petition before the chancellor, asking that his fees be taxed as costs against plaintiffs in accordance with their stipulation, and on the same day Earl Disselhorst, one of the defendants, filed a like petition. Plaintiffs filed motions to strike both petitions on the ground that the decree of June 6, 1938, was final and that the chancellor had no power or

of almost 200 pages, finding that the bill was not in favor of the defendant and recommending that the bill be dismissed for want of equity, and recommending that the bill be dismissed for want of equity. The master's report was an amended certificate of the master's fees and charges, requesting an allowance of \$1,444.00, together with a recommendation that this amount be taxed against plaintiffs, in accordance with their stipulation.

June 6, 1932, a decree was entered which confirmed the master's report in all respects. The temporary injunction remained by plaintiffs was dissolved, and their complaint was dismissed for want of equity. The decree inadvertently contained no provision concerning master's fees, and was entirely silent as to the taxation of costs. A prior decree had been presented to the chancellor, making extensive findings of fact and containing provisions for the taxing of costs and master's fees. The chancellor was rightfully of opinion, however, that it was unnecessary under the practice of to include findings of fact in the decree, and directed the attorney for defendants to present a short decree. Accordingly, the decree of June 6, 1932, was presented, which merely recited that the court had jurisdiction of the subject matter and the parties to the proceeding, that the objections and exceptions filed by plaintiffs to the master's report be overruled, that "the report of Benjamin B. Cohen, master in chancery of this court, be and the same is hereby in all respects approved and confirmed," that the temporary injunction therefore entered be dissolved, and that the complaint be dismissed and amended be dismissed for want of equity. This decree was subsequently affirmed in Alford v. Cohen, 101 Ill. App. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

jurisdiction to alter or modify it by taxing master's fees. The chancellor felt impelled to agree with plaintiffs and strike both petitions, and entered an order accordingly on March 19, 1940, from which the master and Disselhorst have perfected appeals, which were here consolidated for determination under general numbers 41338 and 41364. Subsequently 41364 was dismissed on motion of appellant.

The only issue involved is whether the court had jurisdiction, after the expiration of the term in which the decree was entered, to tax the fees of the master as costs against plaintiffs. Plaintiffs have written a voluminous brief, seeking to sustain the chancellor's orders, assigning some ten separate points dealing mainly with propositions relating to the alteration of final decrees after term, where omissions were made which were intended to be or should have been included in the decree, and emphasizing the finality of judgments and decrees and the reluctance of courts to recognize a revisory power over them after the expiration of the term. However, we find no case among those cited which has any pertinent application to this proceeding. There are two circumstances which impel us to conclude that the chancellor erred in refusing to entertain jurisdiction to tax the master's fees as costs against plaintiffs. The omission to provide for the taxing of costs was undoubtedly an oversight of defendants' attorneys. The original decree presented had such a provision, but when the shorter decree was drawn and entered no mention was made of costs or master's fees. Although the chancellor believed that he had no jurisdiction to entertain the master's petition and that of Disselhorst, he nevertheless rebuked plaintiffs for repudiating their own stipulation. Earlier in the proceeding he had enforced the stipulation by requiring plaintiffs to pay for the stenographic services.

Under the Practice act (chap. 110, par. 188, sec. 64, subpar. (3), Ill. Rev. Stats. 1939), decrees are not required to contain any special findings of fact. This decree was drawn in conformity with the provisions of the act, and it adjudged and

decreed that the master's report be "and the same is hereby in all respects approved and confirmed." The master had certified in detail the character and extent of his services aggregating \$1,484.60, and he requested that the court allow that sum to be taxed against plaintiffs in accordance with their stipulation. No objection or exception was filed to the fees charged, and it therefore seems to us that when the decree was entered, approving and confirming the master's report in all respects, the recommendation as to fees and costs, which was predicated upon plaintiffs' stipulation, was approved in the same sense that all other findings and recommendations of the master were approved. The contention that the court had no jurisdiction after term to tax the master's fees is based on the general proposition that courts have no jurisdiction after term to amend or modify their decrees, but the master's and Disselhorst's petitions did not seek to modify the decree in any respect; they merely asked the court to carry out and give effect to the decree.

Plaintiffs' had instituted the proceeding, the reference to the master was had on their motion, they had stipulated to pay the master's fees, and the master, after an extended hearing filed a report which was in all respects approved and confirmed, including the statement of services and the recommendation as to the payment of his fees and costs. This presented an entirely different situation from those cases cited by plaintiffs, wherein courts have generally adhered to the fundamental rule that decrees cannot be altered or modified after term. Our attention is specifically called to Lilly v. Shaw, 59 Ill. 72, wherein the Supreme court reversed an order entered at a subsequent term allowing attorney's fees to be taxed as costs in a partition proceeding. However, that case differs from the proceeding at bar in several respects. The original decree made provision for taxation of costs, but not for attorney's fees, and the question before the court was whether the pre-existing provision for costs might be amended or changed after the term at which the decree was entered. The important

decree that the master's report be "and the same is hereby in all respects approved and confirmed." The master had certainly in detail the character and extent of the services aggregating \$1,484.60, and he requested that the court allow that sum to be taxed against plaintiffs in accordance with their stipulation. In objection or exception was filed to the fees charged, and it therefore seems to us that when the decree was entered, approving and confirming the master's report in all respects, the recommendation as to fees and costs, which was predicated upon plaintiffs' stipulation, was approved in the same sense that all other findings and recommendations of the master were approved. The contention that the court had no jurisdiction after term to tax the master's fees is based on the general proposition that courts have no jurisdiction after term to amend or modify their decrees, but this principle is inapplicable here; they merely asked the court to carry out the decree in any respect; they merely asked the court to carry out and give effect to the decree.

Plaintiffs had instituted the proceeding, the reference to the master was had on their motion, they had stipulated to pay the master's fees, and the master, after an extended hearing filed a report which was in all respects approved and confirmed, including the statement of services and the recommendation as to the payment of his fees and costs. This presented an entirely different situation from those cases cited by plaintiffs, wherein courts have generally adhered to the fundamental rule that decrees cannot be altered on modified after term. Our attention is specifically called to Ill. v. Shaw, 79 Ill. 72, wherein the Supreme Court reversed an order entered at a subsequent term allowing attorney's fees to be taxed as costs in a partition proceeding. However, that case differs from the proceeding at bar in several respects. The original decree made provision for taxation of costs, but not for attorney's fees, and the question before the court was whether the pre-existing provision for costs might be amended or changed after the term at which the decree was entered. The important

element of the stipulation was not present in that case, and in fact it appears that the parties seriously disagreed upon the question as to whether or not fees could be allowed. Neither do we find that the decree in the Lilly case confirmed the report of the master which recommends the allowance of fees and that they be taxed as costs against plaintiffs pursuant to their stipulation. Lilly v. Shaw has since been cited in three instances, Wain v. Barnay, 219 Ill. App. 401; Sinnock v. Warney, 250 Ill. App. 266, and Davenport v. Kirkland, 156 Ill. 169, but these cases are authority for the proposition that in a chancery proceeding the record may be amended after term when it does not speak the truth because of a clerical misprision, and are not cited as a limitation upon the power of a court to amend its decree under circumstances such as appear upon the record in this proceeding.

It should also be noted that the master had no notice of the entry of the decree here in question, although it is common practice where matters have been generally referred to a master who has filed his report to submit to him the proposed decree. If we were to concur in the contention made by plaintiffs the master would be deprived of a substantial fee for services to which he is rightfully entitled without having been given any notice or opportunity to call the matter to the court's attention when the decree was entered. We think the petition should have been allowed.

The chancellor's orders dismissing the petitions are therefore reversed, and the causes are remanded with directions that the court enter a supplemental order or decree taxing the master's fees as costs in the sum of \$1,484.60, nunc pro tunc as of June 6, 1938, the date on which the decree was entered.

ORDERS REVERSED AND CAUSES REMANDED
WITH DIRECTIONS.

Scanlan and Sullivan, JJ., concur.

[illegible]

These 77 people had names:

41374

JOHN MADRABA et al.,
Appellees,

v.

THE SANITARY DISTRICT OF
CHICAGO, a Municipal corporation,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

309 P.A. 577

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In 1936 the Sanitary District of Chicago, through certain engineering and contracting companies, was constructing an outlet sewer in Berwyn, and in the course of excavation dynamite was used to remove rock under the streets to make way for the sewer. The explosion of the dynamite caused damage to numerous abutting properties in Berwyn. John Madraba, his wife, and other plaintiffs, brought suit against the Sanitary District to recover for the resulting damages. A stipulation was entered into between the various plaintiffs and the Sanitary District, under which the claim asserted by the Madrabas was to be tried separately from the remaining plaintiffs. It was also stipulated that the sole cause of action tried was that arising from the fact of the setting off of charges of dynamite and other violent and dangerous explosives by the contractor alleged in the pleadings of plaintiffs. The cause was tried by the court without a jury, resulting in findings and judgment in favor of Madraba and his wife for \$1,810 and costs, and the cause was continued generally as to the remaining plaintiffs, abiding this appeal by the Sanitary District.

By the terms of an ordinance adopted by the City of Berwyn in 1935, granting to the Sanitary District an easement and authority to construct and maintain an intercepting sewer through certain streets, alleys and highways in said city, the Sanitary District entered into contracts with McRay Engineering & Construction Company and Herlihy Mid-Continent Construction Company, which contained the

THE SANITARY DISTRICT OF
CHICAGO, a municipal corporation,
Applicant.

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CHICAGO, a municipal corporation,
Applicant.

CHICAGO, ILL.
JANUARY 1, 1935.

MR. FRANKLIN JUSTICE PRINCE, CHIEF OF THE COURT.

In 1935 the Sanitary District of Chicago, through certain engineering and contracting companies, was conducting an outlet sewer in Berwyn, and in the course of excavation hydrants were used to remove rock under the streets to make way for the sewer. The

explosion of the dynamite caused damage to numerous buildings, properties in Berwyn. John Habraba, his wife, and other plaintiffs, brought suit against the Sanitary District to recover for the re-

sulting damages. A stipulation was entered into between the various plaintiffs and the Sanitary District, under which the claim asserted by the Habrabas was to be tried separately from the remaining plaintiffs. It was also stipulated that the sole cause of action stated

was that arising from the fact of the setting off of charges of dynamite and other violent and dangerous explosives by the contractor alleged in the pleadings of plaintiffs. The cases were tried by the court without a jury, resulting in findings and judgment in favor of Habraba and his wife for \$1,810 and costs, and the cases yet con-

tinued generally as to the remaining plaintiffs, adding this appeal by the Sanitary District.

By the terms of an ordinance adopted by the City of Berwyn in 1932, granting to the Sanitary District an easement and authority to construct and maintain an intercepting sewer through certain streets, alleys and highways in said city, the Sanitary District entered into contracts with the Engineering & Construction Company and Herlihy Mid-Continent Construction Company, which contained the

following salient provisions: The work to be done involved excavation for the intercepting sewer, and was to be executed under the direction and supervision of the chief engineer of the Sanitary District and his authorized agents. The contractors were to determine the methods to be employed in the work, subject to the requirements of the specifications in the contracts and the approval of the chief engineer. The contractors' attention was directed to the fact that the work was to be performed in a residential community, and that blasting should be so planned and performed as to cause a minimum of inconvenience to the residents. Specific directions were given the contractors relating to the firing of blasts of explosives, and all firing of blasts was required to be done by electricity. Changes in the specific requirements as to the method of firing blasts were subject to the order of the chief engineer. It was provided that the contractors should exercise extreme care in blasting, to give signals of danger before any blasts, and they were forbidden to blast adjacent to any part of the completed sewer. The contractors further agreed to indemnify the Sanitary District from all liability for damage to property caused by explosives, blasting, handling or storing of explosives.

Madraba and his wife owned the property at 2640 South East avenue, Berwyn. The closest blast was set off 472 feet from their home. Between January 7 and February, 1937, 72 blasts were set off at distances varying from 504 to 1086 feet from their property.

Dynamite was the explosive agency used by the contractors in their work. As a result of vibrations and concussions caused by the blasts, plaintiffs' property was seriously damaged, causing displacement of the main supporting beam, settling and sagging of the building, cracking of the foundation and plaster throughout the home and of the combustion^{chamber} in the furnace.

It is conceded by the Sanitary District to be the established rule in this state that a municipality is liable for consequential

Following said provisions: The work to be done involved excavation for the intercepting sewer, and was to be executed under the direction and supervision of the chief engineer of the Sanitary District and his authorized agents. The contractors were to determine the methods to be employed in the work, subject to the requirements of the specifications in the contracts and the approval of the chief engineer. The contractors' attention was directed to the fact that the work was to be performed in a residential community, and that blasting should be so planned and performed as to cause a minimum of inconvenience to the residents. Specific directions were given the contractors relating to the timing of blasts of explosives, and all firing of blasts was required to be done by electricity. Changes in the specific requirements as to the method of firing blasts were subject to the order of the chief engineer. It was provided that the contractors should exercise extreme care in blasting, to give signals of danger before any blasts, and they were forbidden to blast adjacent to any part of the completed sewer. The contractors further agreed to indemnify the sanitary district from all liability for damage to property caused by explosives, blasting, handling or storing of explosives.

Hedra and his wife owned the property at 1044 North West Avenue, Berwyn. The closest blast was set off 472 feet from their home. Between January 7 and February 1, 1927, 72 blasts were set off at distances varying from 304 to 1080 feet from their property.

Dynamite was the explosive agency used by the contractors in their work. As a result of vibrations and concussion caused by the blasts, plaintiff's property was seriously damaged, consisting of displacement of the main supporting beam, settling and sagging of the building, cracking of the foundation and plaster throughout the home and of the ^{chamber} chimney in the furnace.

It is conceded by the Sanitary District to be the established rule in this state that a municipality is liable for consequential

injuries to property, occasioned by concussion and vibration arising through the use of explosives in the construction of a public work, regardless of the absence of negligence or of the intervention of an independent contractor, the use of such explosives being contemplated by the contract. This doctrine was first enunciated in the early case of City of Joliet v. Harwood, 86 Ill. 110, wherein the city let a contract to construct a sewer through certain of its streets according to plans and specifications. The work to be done was such that it was necessary to the performance of the contract that the excavation in a part of a principal street should be done by blasting rock. Each side of the street was bounded by houses. It was stipulated that the contractor "used all due care, skill and caution in the discharge of, and the covering of, all blasts discharged in the prosecution of the work." Nevertheless, rock scattered by the explosion caused damage to an abutting property owner. It was insisted in that case that the contractor was responsible for the injury, and not the city, upon the theory that where public work is done by an independent contractor the doctrine of respondeat superior did not apply. The court, quoted from Dillon on Municipal Corporations (sec. 792), to the effect that "such is the general rule; but it is important to bear in mind that it does not apply where the contract directly requires the performance of work intrinsically dangerous, however skillfully performed. In such a case ^a party authorizing the work is regarded as the author of the mischief resulting from it, whether he does the work himself or lets it out by contract," and concluded that the work which the contractor was there required by the city to do was intrinsically dangerous, however carefully or skillfully done, and that the right of recovery did not rest upon a charge of negligence on the part of the contractor, but rather upon the fact that the city caused work to be done which was intrinsically dangerous, "the natural (though not the necessary) consequence of which was the injury to plaintiff's property," and that

injuries to property, occasionally by construction and violation
existing through the use of explosives in the construction of a
public work, regardless of the nature of negligence or of the
intervention of an independent contractor, the use of such explo-
sives being contemplated by the contract. This doctrine was first
announced in the early case of City of Lowell v. Leland, 35 Ill.
119, wherein the city let a contract to construct a sewer through
certain of its streets according to plans and specifications. The
work to be done was such that it was necessary to the performance
of the contract that the excavation in a part of a residential street
should be done by blasting rock. Much of the street was
bounded by houses. It was stipulated that the contractor "used all
the care, skill and caution in the discharge of, and the covering
of, all places discharged in the prosecution of the work." Never-
theless, rock scattered by the explosion caused damage to an
adjoining property owner. It was included in that case that the
contractor was responsible for the injury, and not the city, when
the theory that where public work is done by an independent con-
tractor the doctrine of respondeat superior did not apply. The
court, however, found in favor of the contractor, and the
to the effect that "such is the general rule; but it is important
to bear in mind that it does not apply where the contract directly
requires the performance of work intrinsically dangerous, however
skillfully performed. In such a case, the contractor is liable for the
injury as the author of the accident resulting therefrom,
whether he does the work himself or lets it out by contract," and
concluded that the work which the contractor was there required by
the city to do was intrinsically dangerous, however carefully or
skillfully done, and that the right of recovery did not rest upon
a charge of negligence on the part of the contractor, but upon
upon the fact that the city caused work to be done which was in-
trinsically dangerous, "the material (though not the necessary) con-
sequence of which was the injury to plaintiff's property," and that

in such case the city is held responsible. This rule of law has been consistently followed in this state. (Fitzsimons & Connell Co. v. Braun, 199 Ill. 390; City of Chicago v. Murdock, 113 Ill. App. 656, 212 Ill. 9; Baker v. Healy Co., 302 Ill. App. 634.)

The Sanitary District argues that because of the strides made in science and industry, and through improvements made in its manufacture and use, dynamite has lost "all the hazards previously attributed to it," and that the intrinsic dangers of dynamite and its use are mere presumptions of fact found solely in the court decisions and should no longer be adhered to without proof of negligence. In order to sustain this position defendant called engineers who were experts in the manufacture and use of dynamite. They testified in effect that dynamite, as manufactured today and when properly used, is no longer intrinsically dangerous, and counsel cite cases from other states holding that unless there is negligence in blasting, no recovery can be had for damages caused through mere concussion, vibration or jarring.

While it is undoubtedly true, as disclosed by the evidence of these experts, that the hazards in the manufacture, transportation and use of dynamite have been greatly reduced, and that reactions and explosions of dynamite may be predetermined with fair accuracy, dynamite is still as powerful an explosive as it ever was, and under the decisions in this state, consistently followed without exception, it is held to be intrinsically dangerous subjecting a municipality which authorizes its use to any resultant injury to the property or persons of others.

We are therefore impelled to hold that the Circuit court properly entered judgment against defendant. The judgment is affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

In such cases the city is held responsible, the rule of law has
 been consistently followed in this state. (Official Reports, 1901, 1902,
 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913,
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ALICE FRIESSER and
JULIUS FRIESSER,

Appellees,

v.

THE REYNOLDS & REYNOLDS COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

3091.A.577²

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Alice, James and Julius Friesser filed their complaint against Walter R. Glaser, alleging that the latter's negligence in operating his automobile was responsible for a collision with an automobile owned by Julius Friesser, in which James and Alice Friesser were riding at the time. In a subsequently amended complaint Reynolds & Reynolds Company was named codefendant, and it was charged that Glaser at the time of the accident was the agent and servant of Reynolds & Reynolds Company. Upon trial James Friesser was dismissed as a party plaintiff, and on plaintiffs' motion Glaser was voluntarily dismissed as a party defendant. At the close of plaintiffs' case Reynolds & Reynolds Company submitted a motion for a directed verdict, which was denied, and this motion was renewed at the close of all the evidence and was reserved by the court until after the jury had returned its verdicts, one in favor of Alice Friesser in the amount of \$7,000, and another in favor of Julius Friesser for \$294. Subsequently, defendant's motion for a directed verdict, at the close of all the evidence, was overruled, and the judgments appealed from were entered upon the verdicts of the jury.

The accident occurred between 4 and 4:30 on the afternoon of March 27, 1937. Glaser was driving west on 58th street, in Chicago. Failing to heed a stop sign at Woodlawn avenue he collided with the automobile of Julius Friesser, in which Alice was riding at the time. It is conceded that the accident was caused solely through Glaser's fault. The question presented for determination is whether

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MR. PRESIDING JUDGE FINDING THAT THE EVIDENCE
 ALICE, JAMES AND JULIUS TRIESSER FILED THEIR COMPLAINTS
 AGAINST WALTER E. GLASSER, ALLEGING THAT THE LATTER'S NEGLIGENCE
 IN OPERATING HIS AUTOMOBILE WAS RESPONSIBLE FOR A COLLISION WITH
 AN AUTOMOBILE OWNED BY JULIUS TRIESSER, IN WHICH JAMES AND ALICE
 TRIESSER WERE RIDING AT THE TIME. IN A SUBSEQUENTLY
 COMPLETED COMPLAINT, REYNOLDS & REYNOLDS COMPANY WAS NAMED CO-DEFENDANT,
 AND IT WAS CHARGED THAT GLASSER AT THE TIME OF THE ACCIDENT WAS
 THE AGENT AND SERVANT OF REYNOLDS & REYNOLDS COMPANY. UPON TRIAL
 JAMES TRIESSER WAS DISMISSED AS A PARTY PLAINTIFF, AND ON PLAINT-
 IFF'S MOTION GLASSER WAS VOLUNTARILY DISMISSED AS A PARTY DEFENDANT.
 AT THE CLOSE OF GLASSER'S CASE REYNOLDS & REYNOLDS COMPANY WAS
 GRANTED A MOTION FOR A DIRECTED VERDICT, WHICH WAS DENIED, AND THIS
 MOTION WAS RENEWED AT THE CLOSE OF ALL THE EVIDENCE AND WAS RENEWED
 BY THE COURT UNTIL AFTER THE JURY HAD RETURNED ITS VERDICT, AND IN
 FAVOR OF ALICE TRIESSER IN THE AMOUNT OF \$7,000, AND ANOTHER IN
 FAVOR OF JULIUS TRIESSER FOR \$254. SUBSEQUENTLY, DEFENDANT'S MOTION
 FOR A DIRECTED VERDICT, AT THE CLOSE OF ALL THE EVIDENCE, WAS OVER-
 RULED, AND THE JUDGMENTS APPEALED FROM WERE ENTERED UPON THE RE-
 QUITS OF THE JURY.

THE ACCIDENT OCCURRED BETWEEN 4 AND 4:10 ON THE AFTERNOON
 OF MARCH 27, 1937. GLASSER WAS DRIVING WEST ON 10TH STREET, IN
 CHICAGO, FAILING TO HEED A STOP SIGN AT A CORNER WHERE HE COLLIDED
 WITH THE AUTOMOBILE OF JULIUS TRIESSER, IN WHICH ALICE WAS RIDING AT
 THE TIME. IT IS CONCEDED THAT THE ACCIDENT WAS CAUSED SOLELY THROUGH
 GLASSER'S FAULT. THE QUESTION PRESENTED FOR DETERMINATION IS WHETHER

or not Glaser, at the time of the accident, was the agent and servant of the Reynolds & Reynolds Company, acting within the scope of his authority, or an independent contractor for whose negligent acts defendant was not responsible.

There is substantially no dispute as to the facts, which may be summarized as follows: Reynolds & Reynolds Co. was engaged in the printing and lithographing business in Dayton, Ohio. One branch of its business was the "Standard Systems" Division, which consisted of the printing of standard accounting systems for use by automobile dealers. These forms were designed for records of accounts receivable, accounts payable, new car records, old car records, repair orders and battery tickets. They were variously adapted for use by Chevrolet, Ford, Graham, Studebaker and other dealers.

William R. Glaser, the original defendant in the case, had been an insurance salesman with the State Mutual Life Insurance Company, officing in Chicago. Early in July, 1936, he had a conversation with Ed Reynolds about associating himself with the Reynolds & Reynolds Co. in some capacity, and later in July he talked with L. H. Forster, sales manager of the company. No agreement was reached as to employment at either of these conferences. August 3, 1936, Forster wrote Glaser a long letter explaining the nature of Reynolds & Reynolds Company's standard systems division, and outlined the possible remuneration that Glaser might expect if he took over the Chicago area. Glaser answered this letter a few days later, saying that he would be willing to undertake the work, and on August 25 Forster invited him to Dayton for a conference, which took place August 31. As a result of this interview in Dayton Glaser became associated with Reynolds & Reynolds Company. He was assigned a territory consisting of Cook, Lake, Henry and Mercer counties in Illinois, and Lake and LaPorte counties in Indiana, in which to sell Reynolds & Reynolds Company's standard systems to

or not Glasser, at the time of the accident, was the agent and servant of the Reynolds & Reynolds Company, acting within the scope of his authority, or an independent contractor for whose negligent acts defendant was not responsible.

There is substantially no dispute as to the facts, which may be summarized as follows: Reynolds & Reynolds Co. was engaged in the printing and lithographing business in Dayton, Ohio. One branch of its business was the "Standard Systems" Division, which consisted of the printing of standard accounting systems for use by automobile dealers. These forms were designed for records of accounts receivable, accounts payable, new car records, old car records, repair orders and battery checks. They were variously adapted for use by Chevrolet, Ford, Graham, Studebaker and other dealers.

William H. Glasser, the original defendant in the case, had been an insurance salesman with the State Mutual Life Insurance Company, officing in Chicago. Early in July, 1936, he had a conversation with Ed Reynolds about associating himself with the Reynolds & Reynolds Co. in some capacity, and later in July he talked with L. H. Forster, sales manager of the company. No agreement was reached as to employment at either of these conferences. August 2, 1936, Forster wrote Glasser a long letter explaining the nature of Reynolds & Reynolds Company's standard systems division, and outlining the possible remuneration that Glasser might expect if he took over the Chicago area. Glasser answered this letter a few days later, saying that he would be willing to undertake the work, and on August 25 Forster invited him to Dayton for a conference, which took place August 31. As a result of this interview in Dayton Glasser became associated with Reynolds & Reynolds Company. He was assigned a territory consisting of Cook, Lake, DuSable and Wayne counties in Illinois, and Lake and Monroe counties in Indiana, in which to sell Reynolds & Reynolds Company's standard systems to

automobile dealers. For his services Glaser was to be paid \$50 a week, in advance, on the first day of every week. Forster told him that he would have to have an automobile, and that he wanted it to be a General Motors car, but that the expense of the automobile would have to be borne by Glaser, out of his salary. Glaser subsequently acquired a Chevrolet car, which he was driving on his way to the place of business of a customer of defendant when the collision occurred.

Glaser testified that he was not so much interested in the salary at that particular time, but in what the future would develop and the possibilities of his employment. Nothing was said with reference to the termination of the employment. Reynolds & Reynolds Company had the right to discharge him at any time. Beginning January 31, 1937, Reynolds & Reynolds Company deducted 50 cents on account of Federal Old Age Benefit tax from the \$50 which it paid Glaser each week.

Before entering on his duties Glaser spent the week of August 31, 1936, in Dayton at his own expense. He was given access to the company files, and prepared a sample copy or catalogue in which was included the various accounting forms used to sell. Mr. Wright of the Reynolds & Reynolds Company assisted him in this work. Defendant furnished Glaser with a price list of its standard systems, stationery, materials, and later on with calling cards. It gave him forms for weekly reports which Glaser was required to complete and forward to the company at the end of each week. These reports were to show the calls made by Glaser each day of the week, as well as the amount of his sales. It was agreed that when Glaser returned to Chicago to assume his duties, the company was to send Wright along with him for about a week to acquaint him with the procedure of selling and to make helpful suggestions.

While in Dayton Glaser was advised that his predecessor in the Chicago area, one Bray, had made a contract with a Chicago printing concern, Clay-Hollen Company, which had been copying the Reynolds &

automobile dealers. For his services Glasser was to be paid \$100 a week, in advance, on the first day of every week. However, Glasser testified that he would have to have an automobile, and that he wanted it to be a General Motors car, but that the company of the automobile would have to be borne by Glasser, out of his salary. Glasser subsequently acquired a Chevrolet car, which he was driving in the way to the place of business of a customer of defendant when the collision occurred.

Glasser testified that he was not so much interested in the salary at that particular time, but in what the company would develop and the possibilities of his employment. Nothing was said with reference to the termination of his employment. Reynolds & Reynolds Company had the right to discharge him at any time. Beginning January 31, 1937, Reynolds & Reynolds Company deducted 10 cents on account of Federal Old Age Benefit tax from the \$100 which it paid Glasser each week.

Before entering on his duties Glasser spent the week of August 31, 1936, in Dayton at his own expense. He was given access to the company files, and prepared a sample copy or catalogue in which was included the various accounting forms used to sell. The Wright of the Reynolds & Reynolds Company assisted him in this work. Defendant furnished Glasser with a price list of its standard system, standard materials, and later on with calling cards. It gave him forms for weekly reports which Glasser was required to complete and forward to the company at the end of each week. These reports were to show the calls made by Glasser each day of the week, as well as the amount of his sales. It was agreed that when Glasser returned to Chicago, to assume his duties, the company was to send Wright along with him for about a week to acquaint him with the procedure of selling and to

While in Dayton Glasser was advised that his predecessor in the Chicago area, one Bray, had made a contract with a Chicago printing concern, Clay-Mollen Company, which had been copying the Reynolds &

Reynolds standard systems forms and selling them to automobile dealers, and it was explained that the United States District Court had entered an injunction restraining Clay-Hollen Company from continuing this practice. Afterward, at a hearing in the federal court, Glaser produced witnesses at Forster's request, for which he received no additional compensation.

After leaving Dayton in August Glaser returned to Chicago with Mr. Wright in the latter's automobile. Wright spent five days in Chicago with Glaser, during which they made calls together, and Wright offered suggestions on the methods of selling the forms to automobile dealers.

Glaser used his home as headquarters having been advised that no desk room was available for him in the Chicago office. He used his home telephone number on his calling cards and paid his own telephone expense. When he acquired the Chevrolet car he took title in his own name, and had the state and city licenses, for which he paid, likewise issued in his name. The expenses of operating the automobile were paid by Glaser.

In proceeding to fulfill his duties as salesman Glaser outlined the territory to be covered each day and would take with him in his car a bag containing samples, price lists and the like. All orders obtained during the day would be mailed to Dayton that same evening. He was directed to leave his cards with dealers upon whom he called and also blank order forms, which he would stamp with his name and telephone number. The company had told him to get such a stamp, and in some instances orders were mailed direct to Dayton by the dealers. After each day's calls, Glaser would jot down where he had been during the day, and from these memos he made up his weekly reports, which he was required to send to the company, which furnished the form upon which the weekly reports were made. These reports required him to list the number of days he spent in Chicago, as well as in any outside territory, and the names and

Reynolds standard systems forms and selling them to automobile dealers, and it was explained that the United States District Court had entered an injunction restraining Gray-Nollen Company from continuing this practice. However, as a matter in the Federal Court, Glasser produced witnesses at Ford's request, for which he received no additional compensation.

After leaving Dayton in August, Glasser returned to Chicago with Mr. Wright in the latter's automobile. Wright spent five days in Chicago with Glasser, during which they made calls together, and Wright offered suggestions on the method of selling the forms to automobile dealers.

Glasser used his home as headquarters, having been advised that no desk room was available for him in the Chicago office. He used his home telephone number on his calling cards and paid his own telephone expense. When he acquired the Chevrolet car he took title in his own name, and had the state and city licenses, for which he paid, likewise issued in his name. The expenses of operating the automobile were paid by Glasser.

In proceeding to fulfill his duties as salesman Glasser outlined the territory to be covered each day and would visit with him in his car a bag containing samples, price lists and the like. All orders obtained during the day would be mailed to Dayton that same evening. He was directed to leave his cards with dealers upon whom he called and also blank order forms, which he would stamp with his name and telephone number. The company had told him to get such a stamp, and in some instances orders were mailed direct to Dayton by the dealers. After each day's sales, Glasser would go down where he had been during the day, and from there return by way of his weekly reports, which he was required to send to the company, which furnished him with the calling cards and forms. These reports required him to list the number of days he spent in Chicago, as well as in any outside territory, and the names and

addresses of all the prospects he had seen, regardless of whether he had succeeded in making sales.

Glaser made no collections for merchandise sold nor did he have any supplies of merchandise in Chicago from which to make deliveries. He had no discretion as to terms or prices for which the merchandise was sold, all terms being C.O.D. The orders taken by Glaser were all filled from Dayton, by mail or express.

Beginning in December, 1936, Glaser began falling behind in his weekly reports, and during January, February and March, 1937, his reports became rather meager and his sales fell to a low point. March 6 the company held up his pay check and on March 29, two days after the accident, Forster, the sales manager of the Reynolds & Reynolds Company, wrote him that the company had other plans for the Chicago territory and it would no longer need his services, at the same time sending his checks for the three weeks commencing March 6. The accident occurred March 27, but defendant had no knowledge thereof when Glaser was discharged March 29.

The courts have consistently held that it is impossible to lay down a rule by which the status of a person performing a service for another can be definitely fixed as an employee or as an independent contractor, and they say that ordinarily no single feature of the relationship is determinative, but that they must all be considered together. Defendant cites and relies upon numerous decisions which are discussed at length in its brief, purporting to hold that an independent contractor is one who renders service in the course of his occupation, representing the will of the person for whom the work is done only as to the results of the work and not as to the details by which it is accomplished. Its counsel argue that in present day business there are many salesmen operating their own automobiles in distributing and selling the products of their employers throughout widely diversified territories; that the very nature of their work makes supervision of the details by which they accomplish their work impossible; that their job is to produce selling

addresses of all the properties in New York, and others of western
he had succeeded in making sales.

Gleason made no collections for merchandise sold and did
he have any supplies of merchandise in Chicago from which to make
deliveries. He had no disposition to do business for which
the merchandise was sold, all having being O. K. The orders taken
by Gleason were all filled from Chicago, by mail or express.

Beginning in December, 1913, Gleason began selling nothing

in his weekly reports, and during January, February and March, 1917,
his reports became rather meager and his sales fell to a low point.

March 6 the company held up his pay check and on March 12, two days
after the accident, Foster, the sales manager of the Reynolds &
Reynolds Company, wrote him that the company had other plans for the
Chicago territory and it would no longer need his services, at
the same time sending him checks for the three weeks commencing
March 6. The accident occurred March 25, but defendant had no
knowledge thereof when Gleason was discharged March 25.

The courts have consistently held that it is impossible to
lay down a rule by which the status of a person performing a service
for another can be definitely fixed as an employee or as an independ-
ent contractor, and they say that ordinarily no single feature of
the relationship is determinative, but that they must all be con-
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present day business there are many salesmen operating their own
automobiles in distributing and selling the products of their em-
ployers throughout widely diversified territories; that the very
nature of their work makes supervision of the details by which they
accomplish their work impossible; that their job is to produce sales

results, and that they are free to select the method and the time in which these results are achieved; that in the most literal sense of the rule such salesmen are independent contractors, since they represent the will of the employer only as to the results achieved and not as to the details by which these results are accomplished; and it is urged that Glaser came within this category under the undisputed facts of the case, and that the court should so have held in ruling upon defendant's motion for a directed verdict at the close of all the evidence.

To sustain this position several of the leading cases are discussed and argued in detail. Ferguson & Lange Foundry Company v. Industrial Commission, 346 Ill. 632, is cited as expressing the rule in Illinois, for which the defendant contends. In that case the court held a workman engaged in hauling wagon loads of rubbish from a foundry yard to be an independent contractor and not a servant of the foundry company, entitled to workmen's compensation. An independent contractor was there defined "as one who renders service in the course of an occupation and represents the will of the person for whom the work is done only with respect to the result and not the means by which that result is accomplished." (Citing cases.) The court also observed that "if the person for whom the service is rendered retains the right to control the details of the work and the method or manner of its performance, the relation of employer and employee exists," and that "the right to control the manner of doing the work is an important if not the principal consideration which determines whether the worker is an employee or an independent contractor." It seems to us that that case is more favorable to plaintiffs than defendant, since it clearly appears from innumerable circumstances adduced upon the hearing in the case at bar that defendant, for whom the service was rendered, retained the right to control and did control the details of Glaser's work and the method or manner of its performance. He was required to account for every day of his

results, and that they are free to select the method and the time in which these results are achieved; that in the most liberal sense of the rule such salesman are independent contractors, whose duty represents the will of the employer only as to the results achieved; and not as to the details by which these results are accomplished; and it is urged that Glasser came within this category under the undisputed facts of the case, and that the court should so have held in ruling upon defendant's motion for a directed verdict at the close of all the evidence.

To sustain this position reversal of the finding seems to be discussed and argued in detail. Winters v. New York Laundry Co., 244 Ill. App. 2d 344, is cited as expressing the rule in Illinois, for which the defendant contends. In that case the court held a workman engaged in hauling wagon loads of rubbish from a laundry yard to be an independent contractor and not a servant of the laundry company, which is defendant's contention. It is argued that contractor was there defined "as one who renders service in the course of an occupation and represents the will of the person for whom the work is done only with respect to the result and not the means by which that result is accomplished." (Citing cases.) The court also observed that "if the person for whom the service is rendered retains the right to control the details of the work and the method or manner of its performance, the relation of employer and employee exists," and that "the right to control the manner of doing the work is an important if not the principal consideration which determines whether the worker is an employee or an independent contractor." It seems to us that that case is more favorable to plaintiff than defendant, since it clearly speaks from immediate circumstances as used upon the hearing in the case at bar that defendant, for whom the service was rendered, retained the right to control and did control the details of Glasser's work and the method or manner of its performance. He was required to account for every day of his

time, giving the names and addresses of persons whom he visited, regardless of whether or not he succeeded in making sales. He had no discretion as to prices or terms, or to make collections, and was under the constant orders of the sales manager in Dayton, who described in detail his methods of operation. When he entered defendant's employ it had stationery and calling cards printed for him, and gave him what purported to be a list of all the dealers in the territory. It wrote him letters complaining about his work, and instructing him in detail as to the method of procedure. It ordered him from time to time to get forms from other customers and turn them over to customers who needed them at once, and later to replace the borrowed forms. He was required and directed to build up good will among prospective purchasers and was told how to do it. When his sales began to fall off defendant wrote Mrs. Glaser that her husband "fell down on the job," and although he evidenced his willingness to work on a straight commission basis, it replied that his work was not satisfactory.

One of the decisions upon which defendant places considerable reliance, and from which it quotes extensively, is Burster v. National Refining Co., 274 Ill. App. 104. It says that the facts in that case are "remarkably similar" to the case at bar, and indeed there is considerable similarity in the facts relating to the two employments, but a marked distinction exists between the two. In the Burster case the court did not decide the question whether the salesman was in fact an employee, but merely held that in going to his sales meeting on his own time and in his own automobile, he was not acting as a servant of his employer. In that case Shockey had been in the employ of the National Refining Company as a salesman, working on a commission basis. His duties were in many respects similar to Glaser's. The refining company held a sales meeting in Peoria, which all salesmen were required to attend. Shockey received notice of this meeting late the preceding afternoon and drove to Peoria that evening, arriving there at 3:30 a.m. in his Essex auto-

time, giving the names and addresses of persons whom he visited, regardless of whether or not he succeeded in making sales. He had no disposition as to prices or terms, or to make recommendations, and was under the constant orders of the sales manager in New York, who described in detail his methods of operation. When he returned, defendant's employer is said to have been waiting and smiling and asked for him, and gave him what purported to be a list of all the business in the territory. It wrote his letters complaining about his work, and instructing him in detail as to the method of procedure. It ordered him from time to time to get orders from other customers and turn them over to customers who needed them as soon as they came to replace the borrowed forms. He was required and directed to bring up food with among prospective purchasers and was told how to do it. When his sales began to fall off defendant wrote Mrs. Glasser that her husband "fell down on the job," and although he evidenced his willingness to work on a straight commission basis, it replied that his work was not satisfactory.

One of the questions upon which defendant places considerable reliance, and from which it quotes extensively, is National Retailing Co., 274 Ill. App. 104. It says that the facts in that case are "remarkably similar" to the case at bar, and indeed there is considerable similarity in the facts relating to the two employments, but a marked distinction exists between the two. In the Burster case the court did not decide the question whether the salesman was in fact an employee, but merely held that in going to his sales meeting on his own time and in his own automobile, he was not acting as a servant of his employer. In that case Burster had been in the employ of the National Retailing Company as a salesman, working on a commission basis. His duties were in many respects similar to Glasser's. The retailing company held a sales meeting in Peoria, which all salesmen were required to attend. Another meeting notice of this meeting late the preceding afternoon and drove to Peoria that evening, arriving there at 3:30 a.m. in the same auto-

mobile. After attending the meeting he visited the company's office in Peoria, obtained a quantity of envelopes, reports and order books, as well as his salary and expense account, which was figured on the basis of his railroad fare from his home in Woodstock to Chicago and from Chicago to Peoria, and return fare the same way. He then started for his home in Woodstock by auto and the collision, which was the subject matter of the suit, occurred while he was returning home. In commenting upon these circumstances the court pointed out that at the time of the collision Shockey was driving his own automobile, not at the direction or under the control of the Refining Company; that in going to and from the salesman's meeting at Peoria, he used his own discretion as to how he should travel, and that at the time of the collision he was not traveling as a servant of defendant. These circumstances are not analogous to the case at bar because the evidence here indicates that Glaser was on his way to visit one of defendant's customers in the regular course of his business.

Another case relied upon by defendant is Hempstead v. Toledo Scale Co., 270 Ill. App. 299. In that case Camboni had been engaged by defendant to sell scales for it in certain parts of Chicago, for which he was paid a commission but no salary or any allowance for expenses. He owned his own automobile and his duties were in many respects similar to Glaser's. At the time of the accident he was on his way to visit a prospective customer. In reliance upon Ferguson & Lange Foundry Co. v. Industrial Commission, 364 Ill. 632, Meece v. Holland Furnace Co., 269 Ill. App. 164, Pyzny v. Loose-Wiles Biscuit Co., 253 Mass. 574, and an Alabama and a Wisconsin decision, the court came to the conclusion that Camboni was not a servant of the biscuit company but an independent contractor. There is in the Hempstead case the distinguishing fact that Camponi was a commission salesman and not under the control of the principal as Glaser was in the case at bar. Camponi located his own prospects and followed his

mobile. After attending the meeting in which the defendant's office in Peoria, obtained a quantity of evidence, which was order books, as well as his salary and expense account, which was returned on the basis of his testimony that from his home in Peoria to Chicago and from Chicago to Peoria, was returned from the same way. He then started for his home in Peoria by auto and the collision, which was the subject matter of the suit, occurred while he was returning home. In commenting upon these circumstances the court pointed out that at the time of the collision the defendant was driving his own automobile, not at the direction or under the control of the Refining Company; that in going to and from the salesman's meeting at Peoria, he used his own discretion as to how he should travel, and that at the time of the collision he was not traveling as a servant of defendant. These circumstances are not sufficient in the case at bar because the evidence here indicates that Glasser was on his way to visit one of defendant's customers in the regular course of his business.

Another case relied upon by defendant is Hennestad v. Folger, 270 Ill. App. 299. In that case Campbell had been engaged by defendant to sell coal for it in certain parts of Chicago, for which he was paid a commission but no salary or any allowance for expenses. He owned his own automobile and his office was in Peoria. At the time of the accident he was engaged to Glasser's. In respect to Glasser's, the court came to the conclusion that Campbell was not a servant of the plaintiff company but an independent contractor. There is in the Hennestad case the distinguishing fact that Campbell was a commission salesman and not under the control of the principal as Glasser was in the case at bar. Campbell located his own prospects and followed his

own method of making sales. He had no regular hours for work and the time devoted to it was entirely within his control. All these circumstances are unlike the facts in the case at bar wherein defendant retained the right to control the details of Glaser's work and did in fact control them in every particular, except that it gave him no specific direction as to the territory he should cover on any particular day. He was, however, required to give full time to his employer and to account for each day's effort, and had **practically** no latitude in his method of procedure.

In Penny v. Loose-Miles Biscuit Co., 253 Mass. 574, a salesman was operating his own automobile at the time of the collision for which suit was brought. Under the terms of his employment he was paid a salary and commission and the expense of operating his automobile. On the day of the accident he had been attending a sales meeting. He left the meeting around five o'clock in the afternoon to drive to a picnic, and started in his car with a friend whom he had met at the picnic to return to Fort Pond. The accident happened on the way there. Quoting from the opinion: "It further appeared, in substance, that 'he did selling until he got to the Field day;' that he 'was going back to see some of his trade;' that 'he didn't have an appointment with anyone in particular *** didn't expect to see any individual but as a whole, expected to see some of his trade there; he intended to do business with them if he should see them.'" Bancroft had no regular hours for work, and could visit the trade within the day as he saw fit, and the court found that Loose-Miles Co. had no right, on the reported facts, to direct the manner in which Bancroft could control the car. While this case appears to be similar on the facts to the case at bar, the opinion is less than two pages long and does not set out detailed circumstances from which any fair comparison between the relationship of the two employments can fairly be made. In the case at bar the parties adduced some 400 pages of evidence, all of which is practically undisputed, indicating a close and detailed control over Glaser, which distinguishes it from the circumstances of the

own method of making sales. He had no special knowledge of the law and the time covered as it was entirely within his knowledge. The circumstances are similar to the facts in the case of the other witnesses and retained the right to conduct the details of his own work and did in fact control them in every particular, except that he gave him no specific direction as to the territory he should cover on any particular day. He was, however, required to give him the day to day employer and to account for each day's effort, and was practically in latitude in his method of procedure.

In Henry V. Jones v. Jones, 1941, 21 West. 2d, 218, a witness was operating his own automobile at the time of the collision the which suit was brought. Under the terms of his employment he was paid a salary and commission and the extent of work and his automobile. On the day of the accident he had been attending a sales meeting. He left the meeting around five o'clock in the afternoon to return to a picnic, and started in his car with a friend whom he had met at the picnic to return to Fort Bond. The accident happened on the way there. Quoting from the opinion: "It further appears, in substance, that 'he did selling until he got to the field day' and he was going back to see some of his friends; that 'he didn't have an appointment with anyone in particular' and didn't expect to see any individual but as a whole, expected to see some of his friends; that he intended to do business with them all he would see them." The court held no regular hours for work, and could visit the home within the city as he saw fit, and the court found that Jones was, in fact, an independent contractor, to direct the manner in which Jones would conduct his work. While this case seems to be similar to the facts in the case of the other witnesses, the opinion is that Jones was not an employee but an independent contractor. The relationship between the two witnesses was that of an employer and an employee. In the case at bar the parties agreed upon the kind of work, all of which is practically unimportant, and is a fixed and settled contract over which, which is distinguished from the other witnesses of the

case relied on by defendant.

It must be conceded that whether or not a given situation or relationship of one person to another is that of agent or independent contractor generally depends upon the circumstances, and as we said in Ryan v. Associates Investment Company, 297 Ill. App. 544, "while many of the reported decisions on the subject stress one or more factors bearing upon the character of the relationship, it appears that the particular factor emphasized by the court in a given case often assumes importance because other circumstances, which may be important, are not present or decisive." In the Ryan case we called attention to the analysis made in the Restatement of the Law of Agency, sec. 220, p. 483, as prepared by the American Law Institute's Committee on Agency, which emphasizes some matters of fact, among others, to be considered in determining the relationship. Among the pertinent matters of fact enumerated are: (1) the extent of control which by the agreement the master may exercise over the details of the work; (2) the length of time for which the person is employed; (3) the method of payment, whether by the time or by the job; and (4) whether or not the parties believe they are creating the relationship of master and servant. As judged by these standards, it is evident that the extent of the control which the Reynolds & Reynolds Company exercised over Glaser was far more extensive and complete in every detail than in any of the cases cited. As to the length of time for which Glaser was employed it is undisputed that he was required to give his full time to defendant and to account every day for everything that he did. The method of payment was a \$50 weekly salary without any other compensation. The best indication that the parties believed they were creating the relationship of master and servant is evidenced by the long detailed circumstances disclosed by the record showing that Glaser was treated as an employee, directed in his movements and methods of making sales with specific detailed instructions as to his methods of operation, and the further fact that there was deducted from each weekly pay

case relied on by defendant.

It must be conceded that whether or not a given situation

or relationship of one person to another is that of agent or in-

dependent contractor generally depends upon the circumstances, and

as we said in Evan v. Associated Investment Company, 271 Ill. 414,

244, "while many of the reported decisions on the subject stress

one or more factors bearing upon the character of the relationship,

it appears that the particular factor emphasized by the court in a

given case is almost invariably different from that in another,

which may be important, are not present or decisive." In the Evan

case we called attention to the analysis made in the statement of

the law of Agency, sec. 220, p. 431, as proposed by the Institute

Law Institute's Committee on Agency, which emphasized some matters

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extent of control which by the agreement the master may exercise

over the details of the work; (2) the length of time for which the

person is employed; (3) the method of payment, whether by the time

or by the job; and (4) whether or not the parties believe they are

creating the relationship of master and servant. As judged by these

standards, it is evident that the extent of the control which the

Reynolds & Reynolds Company exercised over Glasser was far more ex-

tensive and complete in every detail than in any of the cases cited.

As to the length of time for which Glasser was employed it is undis-

puted that he was required to give his full time to defendant and to

account every day for everything that he did. The method of payment

was a \$20 weekly salary without any other compensation. The best

indication that the parties believed they were creating the relation-

ship of master and servant is evidenced by the long detailed circum-

stances disclosed by the record showing that Glasser was treated as

an employee, directed in his movements and methods of working, with

check the sum of 50 cents for federal old age benefit.

The record contains numerous letters that passed between the company and Glaser, which it is impossible to detail within the reasonable bounds of this opinion. These letters and telegrams indicate that Glaser was a company man, not the master of his own time or his own energies and working on a flat salary and with little or no discretion. His operations were at all times guided by detailed instructions from the company, and there is nothing to indicate that he was building something of his own when he did his work, or that he was independent in the sense that it was his business and that he was working on it as an independent contractor.

Defendant's counsel concede that the controlling circumstances are usually questions for the jury under proper instructions of the court, but they say that since the facts are undisputed the court should have determined the motion for a directed verdict upon the facts in defendant's favor. This contention overlooks the many circumstances of record which favor plaintiffs' version of the character of the employment, and we certainly cannot view this record as so clearly indicating a relationship of independent contractor as to hold that the court would have been justified in directing a verdict in favor of defendant.

The only other ground urged for reversal is that the trial court refused to receive in evidence the records of the Jackson Park Hospital relating to plaintiff Alice Friesser. These records bear only upon the question of damages, and since there is no complaint as to the amount of the verdicts we would not be justified in reversing the judgments because of the court's ruling.

For the reasons given the judgments of the Circuit court should be affirmed. It is so ordered.

JUDGMENTS AFFIRMED.

Scanlan and Sullivan, JJ., concur.

check the sum of 75 cents for General and his family.

The record contains numerous letters that passed between

the company and Glasser, which it is impossible to recall at this time.

reasonable basis of this opinion. These letters and telephone

indicate that Glasser was a company man, and the matter of his own

time on his own energies and working on a full salary and with

little or no discretion. His operations were at all times subject to

detailed instructions from the company, and there is nothing to in-

dicate that he was building something of his own when he did his work,

or that he was independent in the sense that he was his business and

that he was working on it as an independent contractor.

Defendant's counsel concede that the controlling circum-

stances are usually questions for the jury under proper instructions

of the court, but they say that since the facts are undisputed the

court should have determined the matter for a disputed verdict.

Upon the facts in defendant's favor. This contention overlooks the

many circumstances of record which favor plaintiff's version of the

character of the employment, and we certainly cannot view this record

as so clearly indicating a relationship of independent contractor as

to hold that the court would have been justified in finding a ver-

dict in favor of defendant.

The only other ground urged for reversal is that the trial

court refused to receive in evidence the records of the Jackson Hotel

Hospital relating to plaintiff Alice Whitten. These records bear

only upon the question of damages, and since there is no dispute

as to the amount of the verdict we would not be justified in reversing

the judgment because of the court's ruling.

For the reasons given the judgments of the circuit court

should be affirmed. It is so ordered.

WILLIAM H. HARRIS,

Attorney for Plaintiff.

41596

IRVING G. ZAZOVE,
Appellant,

v.

GUY A. RICHARDSON and WALTER
J. CUMMINGS, as Receivers,
etc., et al.,
Appellees.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

309 L.A. 578

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action to enforce an attorney's lien. After plaintiff had filed a verified amended complaint and defendants had filed a verified answer to the complaint, and plaintiff had filed a verified answer to defendants' answer, plaintiff filed a motion and affidavit for a summary judgment, which was stricken on defendants' motion. The case was tried by the court and at the conclusion of the trial there was a finding and judgment for defendants. Some days after the entry of the judgment plaintiff made a motion to vacate the finding and judgment and to enter a judgment for plaintiff, or, in the alternative, to grant plaintiff a new trial, which motion was overruled. Plaintiff appeals.

On Friday, April 21, 1939, Alvin Traub, the sixteen-year-old son of Sidney and Harriet Traub, was riding in an automobile driven by a boy named Abe Brown. A third boy, named Dubanow, was also in the automobile. The automobile belonged to the firm of Zazove & Brown, who were auctioneers, and Abe Brown was a nephew of the Brown of that firm. There was a collision between the automobile and a street car and as a result Alvin Traub and at least one of the other boys were injured. On the same afternoon Alvin Traub telephoned his mother that he had been injured and was at St. Mary's hospital and was unable to leave the hospital, but he would not tell her how badly he was hurt. When Mrs. Traub received the message she became nervous and excited and called the family doctor, who came to her home. After the doctor had given her a sedative he took her in his car to the hospital. They arrived there between 4:30 and 5 o'clock. Mrs. Traub was unable to see her

IRVING G. SAROVE,
Appellant,

v.

JOHN E. KIRK, JR. and
J. COOMBS, as Respondents,
etc., et al.,
Appellees.

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

An action to enforce an attorney's lien. After trial,

plaintiff had filed a verified amended complaint and defendants had
filed a verified answer to the complaint, and plaintiff had filed
a verified answer to defendants' answer, plaintiff filed a motion
and affidavit for a summary judgment, which was opinion on
defendants' motion. The case was tried by the court and at the
conclusion of the trial there was a finding and judgment for
defendants. Some days after the entry of the judgment plaintiff
made a motion to vacate the finding and judgment and to enter a
judgment for plaintiff, or, in the alternative, to grant plaintiff
a new trial, which motion was overruled. Plaintiff appeals.

On January 21, 1935, Alvin Trumb, son of Alvin and
old son of Sidney and Harriet Trumb, was riding in an automobile
driven by a boy named Abe Brown. A third boy, named Johnson, was
also in the automobile. The automobile was owned by the firm of
Sarove & Brown, who were auctioneers, and the Brown was a nephew
of the Brown of that firm. There was a collision between the
automobile and a street car and as a result Alvin Trumb and at
least one of the other boys were injured. On the same afternoon
Alvin Trumb telephoned his mother that he had been injured and
was at St. Mary's hospital and was unable to leave the hospital,
but he would not tell her how badly he was hurt. When Mrs. Trumb
received the message she became nervous and excited and called the
family doctor, who came to her home. After the doctor had given
her a sedative he took her in his car to the hospital. When he arrived
there between 4:30 and 5 o'clock. Mrs. Trumb was unable to get out

son as he was already in the operating room, so she stood in the corridor outside of that room. At that time she did not know plaintiff and had never heard of him. Plaintiff testified that he did not know Mr. and Mrs. Traub prior to April 21, 1939. Mrs. Traub testified that while she was waiting in the corridor a man approached her and told her he was an uncle of the Brown boy who drove the car, that he was representing the Brown boy and that he would like to represent the Traubs "because I would perhaps feel it a duty if I figured that somebody interested in the Brown boy would take care of us;" that the man told her that he felt sorry for her, that she seemed to be in a nervous condition, and that she should try and control herself; that she should not worry, that all of the bills would be taken care of if he was taken on. Mrs. Traub further testified, "He seemed to be very nice, and naturally I took it for granted he would be the one to represent us. He seemed to be interested in me and I figured well, a man like that would be all right;" that the man told her he was Mr. Zazove, that he had no card but that he would give her his name and address and that he would get in touch with her; that he wrote in ink on a slip of paper in her presence the following: "I. G. Zazove 139 N. Clark St Cen 0898 R. 1616;" that while she was in the corridor the man had her sign the contract upon which plaintiff claims his lien. She testified that she did not read it; that she "wasn't able to;" that "the condition I was in I didn't know what happened;" that she did not receive a copy of the paper; that when she signed it her boy was still in the operating room; that she "really didn't know what I was signing the day I signed it;" that the man wrote the document in her presence, which she then and there signed; that her husband was out of town at the time and she did not know what to do about the matter; that she figured a man like that would be all right.

The following is the alleged contract that Mrs. Traub signed:

"I, hereby employ Irving G. Zazove, attorney at law to prosecute my claim against Cngo Surface Lines, for injuries sus-

son as he was already in the operating room, so that I could in the
corridor outside of that room. It was then that I saw Mrs. Frank
plaintiff and had never heard of him. Plaintiff testified that
he did not know Mr. and Mrs. Frank until the day of the trial. That
Frank testified that while she was waiting in the corridor I was
approached her and told her he was the man of the Frank family who
drove the car, that he was representing the Frank boy and that he
would like to represent the Frank family. I said to her, "I am not
a lawyer, I am only a man who is interested in the Frank family and
take care of us;" that the man told her that he was the Frank boy and
that she seemed to be in a nervous condition, and that she should
try and control herself; that she should not worry, and all of the
while would be taken care of if he was taken care of, that Frank testified
testified, "It seemed to be very nice, and I was very happy to see it for
eventually he would be the one to represent me. He seemed to be in
contact with me and I figured well, a man like that would be in
right;" that the man told her he was Mr. Frank, that he was the Frank
but that he would give her his name and address and that he would
get in touch with her; that he wrote in ink on a slip of paper in
her presence the following: "I, G. Frank, do hereby certify that
E. Frank, that while she was in the corridor she was told that she was
the contract upon which plaintiff claims his share. She testified
that she did not read it; that she "didn't read it" that "I didn't
condition I was in I didn't know what was going on; that she did not
receive a copy of the paper; that when she signed it she did not
still in the operating room; that the "Frank family" was not
was signing the day I signed it;" that she was told that she was
in her presence, which was then and there signed by the Frank family
was out of town at the time and she did not know what to do about
the matter; that she figured a man like that would be in the
The following is the alleged conversation between Mrs. Frank and
"I, hereby certify Irving G. Frank, do hereby certify to
present my claim against the Frank family, the Frank family."

tained by me on or about April 21 1939.

"The compensation of my said attorney is to be (1/3) or (33 1/3) per cent of any or all moneys paid by said defendant or defendants arising out of said claim.

"It is however, understood and agreed that my said attorney is to receive no compensation unless damages are paid on account of said claim.

"I hereby accept the above in all its terms.

"Alvin Traub a minor by his
mother and next friend
"Harriet Traub

"I hereby accept the above
in all of its terms

"Irving G. Zazove

"WITNESSED BY: _____"

The document is all in typewriting save the following words (which were written in ink by the man who had Mrs. Traub sign it): "Chgo Surface Lines," "April 21," "Alvin Traub a minor by his mother and next friend Harriet Traub;" and the following words, "I hereby accept the above in all of its terms Irving G. Zazove," which plaintiff says he wrote. It appears from the testimony of plaintiff that the man who had Mrs. Traub sign the document was plaintiff's brother, Abe Zazove, who was a member of the firm of Zazove & Brown. He was not produced as a witness in the case.

Plaintiff testified, at first, that he did not prepare the alleged contract and that he did not know who did prepare it; that it was not written on one of the typewriters used in his office; that it was his impression that it was written on one of the typewriters of Zazove & Brown; that Zazove & Brown were not authorized to write such contracts; that the first time he saw it was "Monday, I guess;" that "it may have been mailed in," but that he did not know how the contract came to his office. "Q. Did you send anyone on April 21, 1939 to St. Mary's Hospital? A. No sir, I never had a chaser in my life. I don't employ none;" that Abe did not tell

joined by me on or about April 21 1933.

"The compensation of my said attorney is to be (1/3) or (2/3) per cent of any or all moneys paid by said defendant or defendants arising out of said claim."

"It is however, understood and agreed that my said attorney is to receive no compensation unless damages are paid on account of said claim."

"I hereby accept the above in all its terms."

"Given Under a minor by his
mother and next friend
Marjorie Brown"

"I hereby accept the above
in all its terms
Living G. Brown"

"Witnessed by"

"The following is all in typewritten form and is correct"

words (which were written in ink by the man who had been, Brown sign it): "Once before, I, 'April 21, '33' given under a minor by his mother and next friend Marjorie Brown; and the following words, 'I hereby accept the above in all its terms Living G. Brown, '33' which plaintiff says he wrote. It appears from the testimony of plaintiff that the man who had been, Brown sign the document was plaintiff's brother, the Brown, who was a member of the firm of Brown & Brown. He was not produced as a witness in the case."

case.

Plaintiff testified, at first, that he did not prepare the alleged contract and that he did not know who did prepare it; that it was not written on one of the typewritten men in his office; that it was his impression that it was written on one of the typewriters of Brown & Brown; that Brown & Brown were not authorized to write such contracts; that the first time he saw it was "Monday, I guess;" that "it may have been mailed in," but that he did not know how the contract came to his office. "Q. Did you send anyone on April 21, 1933 to St. Mary's Hospital? A. No sir, I never saw a letter in my life. I don't employ none;" that he did not tell

him he was at St. Mary's hospital that afternoon. After considerable equivocation the witness testified that Abe Zazove prepared the document after a girl in plaintiff's office had read to Abe, over the telephone, a contract form like the contract signed by Mrs. Traub, but in which the words "fifty per cent" were used, but that Abe "was asked to put in one-third." Plaintiff further testified that he mailed to Mrs. Traub a contract, in his handwriting, that called for a fifty per cent fee but that he never saw that contract again; that later, in a talk with Mrs. Traub over the telephone, she said that she had received the contract but that she did not like the fifty per cent terms, and he said he would send her out a contract that called for a fee of thirty-three and one-third per cent. Plaintiff testified that he saw Mrs. Traub in his office at least five times; that she called regularly; that she called so many times that she almost overdid it. Mrs. Traub testified in rebuttal that she never had a conversation with plaintiff either over the telephone or in person until plaintiff called her over the telephone three or four days after the matter was taken out of her hands by her husband; that on April 21, 1939, she had never heard of Irving Zazove; that she never was in plaintiff's office at any time.

At the time of the accident Sidney Traub, the father of Alvin, was out of town, but he arrived home about 10:30 p.m. that testified that he night. He found no one at home and neighbors told him that an accident had happened to his boy and he then went over to the hospital, and his wife, who was still there, told him how she came to sign the paper; that he then called up Sidney Lyon, an attorney, and asked him to represent him and the boy in the matter of the accident. The witness stated that Attorney Lyon then filed a petition in the Probate court and had him appointed guardian of the boy; that thereafter Attorney Lyon had an order entered in that court authorizing the witness, as guardian, to sign a release, releasing the Chicago Surface Lines, for \$1,140; that after the

him he was at St. Mary's Hospital that afternoon. After consulting
erale equivocation the witness testified that the above paragraph
the document after a girl in plaintiff's office had read to her,
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his office at least five times; that she called regularly; that she
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fied in rebuttal that she never had a conversation with plaintiff
either over the telephone or in person until plaintiff called her
over the telephone three or four days after the matter was raised
out of her hands by her husband; that on April 11, 1939, she had
never heard of Irving Lavoie; that she never was in plaintiff's
office at any time.

At the time of the accident Sidney Tramp, the father of
Alvin, was out of town, but he arrived home about 10:30 p.m. that
night. He found no one at home and neighbors told him that an
accident had happened to his boy and he then went over to the hospi-
tal, and his wife, who was still there, told him how the case be-
sides the paper; that he then called up Sidney Lyon, an attorney,
and asked him to represent him and the boy in the matter of the
accident. The witness stated that Attorney Lyon then filed a
petition in the Probate court and had him appointed guardian of
the boy; that thereafter Attorney Lyon had an order entered in
that court authorizing the witness, as guardian, to sign a release,
releasing the Chicago Surface Lines, for \$1,140; that after the

witness had asked Lyon to represent him plaintiff called the witness on the telephone and told him that he would have to pay plaintiff in the matter; that he never saw plaintiff until the day of the trial. **Attorney** Lyon testified that on Saturday morning or Monday morning subsequent to the accident he called plaintiff on the telephone and told him that the Traubs were relatives of his; that Mr. Traub was a client of his and wanted the witness to represent them, and that plaintiff should do nothing further in the case; that plaintiff said that the witness was trying to steal ^a case away from him; that the witness told plaintiff that he was not trying to steal any case from him but that the Traubs wanted him to represent them, and that under the circumstances surrounding the signing of the contract it was not worth the paper it was written on; that Mrs. Traub did not know what she had signed, as the boy was being operated on at the time and that "it was a question of life and death." Both Mr. and Mrs. Traub testified that they never received from plaintiff a contract through the mail. It is admitted that Attorney Lyon obtained permission from the Probate court for the guardian to settle the case for \$1,140 and that defendants paid that amount to the guardian; that defendants refused to recognize the alleged lien of plaintiff upon the ground that they had settled the claim under the assurance by **Attorney** Sidney Lyon that there was no legal liability under the alleged attorney's lien. Plaintiff was the sole witness in his own behalf save that he called Mrs. Traub for the purpose of having her testify that she signed the alleged contract.

From the opinion rendered by the experienced trial judge it is clear that he believed the testimony for defendants and disbelieved the testimony of plaintiff. The court expressed surprise that plaintiff, a lawyer, whose ethics were challenged, should not have called his brother as a witness to rebut Mrs. Traub's testimony as to what occurred at the hospital; and the court further expressed surprise that plaintiff did not call the employees in his office to rebut Mrs. Traub's testimony that she had never been at plaintiff's office, and to support plaintiff's testimony that she had

witness had asked upon to represent him. Plaintiff's counsel had been on the telephone and told him that he would be able to get a bill in the matter; that he never saw Plaintiff's bill and that the bill was not a bill. Attorney Lyon testified that on Monday morning subsequent to the evidence he called Plaintiff on the telephone and told him that the bill was not a bill and that Mr. Trump was a client of his and asked the witness to represent him, and that Plaintiff should do nothing further in the case; that Plaintiff said that the witness was trying to tell him that the witness said Plaintiff that he was not going to state any more from the bill and that Plaintiff was not going to state and that under the circumstances surrounding the signing of the contract it was not worth the paper it was written on; that Plaintiff did not know what the bill signed, as the bill was being signed on at the time and that "it was a question of life and death," as Mr. and Mrs. Trump testified that they never received from Plaintiff a contract through the mail. It is admitted that Attorney Lyon obtained permission from the Probate Court for the permission to testify the case for \$1,40 and that defendants said that amount to the Plaintiff; that defendants refused to recognize the alleged bill of Plaintiff upon the ground that they had called the claim under the assurance by Attorney Lyon from that there was no legal liability under the alleged attorney's lien. Plaintiff was the sole witness in his own behalf save that he called Mrs. Trump for the purpose of having her testify that she signed the alleged contract. From the opinion rendered by the experienced trial judge it is clear that he believed the testimony of Plaintiff and that he believed the testimony of Plaintiff. The court expressed surprise that Plaintiff, a lawyer, would call his brother as a witness to repeat the testimony as to what occurred at the hospital; and the court further expressed surprise that Plaintiff did not call the employee in his office to repeat Mrs. Trump's testimony that she had never seen a bill to support Plaintiff's testimony that she had

been in his office four or five, or possibly six times. The trial court stated that Mrs. Traub had the right to believe that she had employed as her lawyer the person who secured her signature to the alleged contract. The court called attention to the uncontradicted evidence that Mrs. Traub at the time of the signing of the alleged contract was excited and nervous; that she had been given a sedative by her family doctor, who accompanied her to the hospital, and that she never read the paper she signed and did not know what she was signing.

After carefully considering the record in this case and the arguments of counsel we have reached the following conclusions: That the brother of plaintiff approached Mrs. Traub in the corridor outside of the operating room in St. Mary's hospital at a time when she was under severe mental stress due to the fact that her young boy was then upon the operating table and she did not know what the result of the operation might be; that her condition was such that her family physician, who accompanied her to the hospital, deemed it necessary to give her a sedative; that plaintiff's brother posed as a lawyer and after he had succeeded in winning her confidence, solicited and secured from her the alleged contract; that he lead her to believe that she was making the contract with him when in fact the contract contained the name of an attorney whom the woman had never seen and of whom she had never heard; that she never read the contract and was not in a proper condition to understand it if she had read it; that the trial court was justified in finding from plaintiff's evidence that plaintiff's brother was not authorized to represent him and that under all the circumstances there was no lawful contract between plaintiff and Mrs. Traub. We feel impelled to say that it seems strange, indeed, that a lawyer should seek to enforce a lien claim upon an alleged contract obtained under the circumstances present in this case. In his reply brief plaintiff argues that the contract in question "not having been directly assailed by a proceeding to set it aside, could not be inquired

been in his office four or five, or possibly six days. The court stated that Mrs. Frank had the right to believe that she was employed as her lawyer the person who signed the document in the alleged contract. The court called attention to the fact that evidence that Mrs. Frank at the time of the signing of the alleged contract was excited and nervous; that she had been advised by her family doctor, who recommended her to go to the hospital, and that she never read the paper she signed and did not know what she was signing.

After carefully considering the record in this case and the arguments of counsel we have reached the following conclusions: That the brother of Plaintiff approached Mrs. Frank in the waiting room outside of the operating room in St. Mary's Hospital at a time when she was under severe mental stress due to the fact that her young boy was then upon the operating table and she did not see what the result of the operation might be; that her condition was such that her family physician, who recommended her to go to the hospital, found it necessary to give her a sedative; that Plaintiff's brother acted as a lawyer and after he had succeeded in signing the contract, solicited and secured from her the alleged contract; that he then led her to believe that she was making the contract with the person that the contract contained the name of an attorney from the town had never seen and of whom she had never heard; that she never saw the contract and was not in a proper position to understand it; that she had read it; that the trial court was justified in finding that Plaintiff's evidence that Plaintiff's brother was not authorized to represent him and that under all the circumstances there was no lawful contract between Plaintiff and Mrs. Frank. We find it to say that it seems strange, indeed, that a lawyer would not enforce a lien claim upon an alleged contract signed by a client in circumstances present in this case. In this case, Plaintiff argues that the contract in question "not having been signed" is null and void by a proceeding to set it aside, could not be enforced.

into collaterally" in the instant case. We need only say in reference to this contention that no such contention was raised in the trial court. In plaintiff's written motion to vacate the finding and judgment of the court and to enter a judgment for plaintiff, or, in the alternative, to grant plaintiff a new trial, ten grounds are alleged in support of the motion, but the point now raised by plaintiff was not one of them.

The judgment of the Circuit court of Cook county is a just one and it is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

46779

MAURICE H. KAMM,
Appellant,

v.

E. G. SWANSON, R. J. PFORDRESHER
and MINNIE E. NEER,
Appellees.

)
)
) APPEAL FROM CIRCUIT COURT,
)
) COOK COUNTY.

)
) 3091A 578
)

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action at law brought by plaintiff, Maurice H. Kamm, to recover from the defendants, E. G. Swanson, R. J. Pfordresher and Minnie E. Neer, an overpayment of money alleged to have been paid to said defendants as the purchase price for the title to certain real estate and mortgage bonds which were a lien thereon. The trial court having sustained defendants' motion to strike plaintiff's complaint, the latter elected to stand on his complaint and the suit was dismissed. This appeal followed.

The complaint consisting of three counts, (1) to recover an overpayment made on a contract, (2) to recover the same amount as damages, and (3) to recover money had and received to plaintiff's credit, alleged that on April 19, 1937, the defendants, E. G. Swanson, R. J. Pfordresher and Minnie E. Neer, were doing business under the name of Bondholders Protective Committee (sometimes hereinafter for convenience referred to as Committee) and then owned and held certain bonds secured by a trust deed on real estate "commonly called and known as the Barbara Building;" that as such owners of said bonds defendants had full power and legal authority to sell and dispose thereof in their discretion; that defendants also owned and controlled the legal title to the property on which said building was located; that defendants kept a journal of their proceedings and books and records of their transactions and business and that defendant E. G. Swanson functioned as chairman of said

MAURICE H. KAMM
Appellant

E. G. SWANSON, R. J. FLORESCHER
and ALVIN E. KEAR
Appellees

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action at law brought by plaintiff, Maurice H. Kamm, to recover from the defendants, E. G. Swanson, R. J. Florescher and Alvin E. Kear, an amount of money alleged to have been paid to said defendants as the purchase price for the title to certain real estate and mortgage bonds which were a lien thereon. The trial court having sustained defendants' motion to strike plaintiff's complaint, the latter elected to stand on his complaint and the suit was dismissed. This appeal followed.

The complaint consisting of three counts, (1) to recover an overpayment made on a contract, (2) to recover the same amount as damages, and (3) to recover money had and received to plaintiff's credit, alleged that on April 19, 1937, the defendants, E. G. Swanson, R. J. Florescher and Alvin E. Kear, were doing business under the name of Bondholders Protective Committee (sometimes hereinafter for convenience referred to as Committee) and then owned and held certain bonds secured by a trust deed on real estate "commonly called and known as the Barbara Building;" that as such owners of said bonds defendants had full power and legal authority to sell and dispose thereof in their discretion; that defendants also owned and controlled the legal title to the property on which said building was located; that defendants kept a journal of their proceedings and books and records of their transactions and business and that defendant E. G. Swanson functioned as chairman of said

Committee and as such chairman acted as the agent of the other two defendants "in their business transactions and relationships with persons with whom they did business;" that "on April 19, 1937, plaintiff made a written proposal to defendants through their chairman to purchase all the bonds of said Barabara Building then owned by defendants and the title to *** said property, under the terms and conditions of said proposal to said E. G. Swanson;" that "all of the amounts appearing in said proposal were sums appearing upon the records kept by defendants in their dealings with said property, or were amounts obtained by them in their own investigations, and were supplied by defendants to plaintiff and were relied upon by plaintiff in making said proposal to said defendants;" and that as an inducement to contract with them defendants "represented to plaintiff that the general taxes due and unpaid upon said premises through and including 1935, with full penalties to the date of the proposal, was [were] \$13,358, and that the special assessments levied and assessed against the premises then existing were not more than the sum of \$500."

The complaint alleged further that plaintiff's proposal was accompanied by a deposit of \$1,500 earnest money to be applied on the purchase price of the bonds and title to the property if such proposal was accepted within thirty days; that defendants "accepted plaintiff's said proposal upon the records of their proceedings," that the defendant E. G. Swanson as chairman of the Bondholders Protective Committee forwarded a letter to plaintiff accepting his proposal; that said proposal and the acceptance thereof constituted a binding contract between plaintiff and defendants and that "upon payment of the consideration therein expressed and upon the conditions stated in said proposal, defendants became and were obligated to deliver said bonds to the plaintiff, and convey said title as plaintiff might direct;" that "in reliance upon the representation of defendants as to the status of the unpaid taxes, plaintiff paid to defendants the total of the consider-

Committee and as such chairman before as the agent of the other two
defendants "in their business transactions and relationship with
persons with whom they did business;" that "on April 19, 1937, plain-
tiff made a written proposal to defendants through their chairman to
purchase all the bonds of said defendant building then owned by de-
fendants and the title to *** said property, under the terms and con-
ditions of said proposal to said E. G. Swanson;" that "all of the
amounts appearing in said proposal were sums appearing upon the
records kept by defendants in their dealings with said property, or
were amounts obtained by them in their own investigations, and were
supplied by defendants to plaintiff and were relied upon by plaintiff
in making said proposal to said defendants;" and that as an inducement
to contract with them defendants "represented to plaintiff that the
general taxes due and unpaid upon said premises through and in-
cluding 1935, with full penalties to the date of the proposal, was
[were] \$13,328, and that the special assessments levied and assessed
against the premises then existing were not more than the sum of \$750."
The complaint alleged further that plaintiff's proposal was
accompanied by a deposit of \$1,500 earnest money to be applied on the
purchase price of the bonds and title to the property in such proposal
was accepted within thirty days; that defendants "accepted plaintiff's
said proposal upon the records of their proceedings," that the defend-
ants and E. G. Swanson as chairman of the Bondholders Protective Committee
forwarded a letter to plaintiff accepting his proposal; that said pro-
posal and the acceptance thereof constituted a binding contract between
plaintiff and defendants and that "upon payment of the consideration
therein expressed and upon the conditions stated in said proposal, de-
fendants became and were obligated to deliver said bonds to the plain-
tiff, and convey said title as plaintiff might direct;" that "the
reliance upon the representation of defendants as to the status of the
unpaid taxes, plaintiff paid to defendants the total of the amount

ations specified in said proposal and the defendants thereupon caused the holder of the title to said property to execute a quit claim deed to said property to plaintiff's nominee by virtue of which plaintiff's nominee took title to said property burdened with taxes and special assessments as they actually existed thereon;" that "the general taxes and full penalties then existing on said property figured to and including July 9, 1937, were not in fact the sum of \$13,358 as represented by defendants to plaintiff and as stated in said proposal, but said taxes totaled the sum of \$14,156.64 and that the special assessments due thereon were not as represented by defendants to plaintiff, and as stated in said proposal, but said special assessments in fact totaled the sum of \$2,148.31;" and that "thereupon defendants became and were obligated to return to plaintiff the difference between the amount of taxes and special assessments as represented by defendants and the amount of taxes and special assessments actually a burden upon said property as money overpaid to defendants on said contract and received by defendants to the credit of plaintiff, which upon demand the defendants have refused and yet refuse to repay to plaintiff."

Plaintiff asked judgment for \$2,446.89, the amount that the general taxes and special assessments on the property was in excess of the amount of said taxes and assessments as represented by the defendant Swanson to plaintiff. He also asked for interest on said excess.

Plaintiff's proposal of purchase contained in a letter from him to the defendant Swanson, chairman of the Bondholders Protective Committee, was attached to the complaint as a part thereof. Said proposal was as follows:

"Following a series of conferences with you, I submit to you herewith an offer to purchase all of the deposited bonds on the Barbara Building located in Maywood, Illinois, which bonds are now held by your Committee, upon the following terms and conditions:

"(1) That I shall pay for all bonds deposited with you a sum not to exceed \$75,500 in principal amount, 35% of the face

attorneys specified in said proposal and the defendant thereupon caused the holder of the title to said property to execute a writ of claim based on said property to plaintiff's mortgage by virtue of which plaintiff's mortgage took title to said property purchased with taxes and special assessments as they actually existed thereon; that "the general taxes and mill levies then existing on said property figured to and including July 1, 1937, were not in fact the sum of \$13,382 as represented by defendant to plaintiff and as stated in said proposal, but said taxes totaled the sum of \$14,156.04 and that the special assessments due thereon were not as represented by defendant to plaintiff, and as stated in said proposal, but said special assessments in fact totaled the sum of \$2,146.51; and that "thereupon defendant became and were obligated to return to plaintiff the difference between the amount of taxes and special assessments as represented by defendant and the amount of taxes and special assessments actually a burden upon said property as money overpaid to defendant on said contract and received by defendant to the credit of plaintiff, which upon demand the defendant have refused and yet refuse to repay to plaintiff."

Plaintiff asked judgment for \$2,440.00, the amount that the general taxes and special assessments on the property was in excess of the amount of said taxes and assessments as represented by the defendant Swanson to plaintiff. He also asked for interest on said amount.

Plaintiff's proposal of purchase contained in a letter from him to the defendant Swanson, chairman of the defendant's Protective Committee, was attached to the complaint as a part thereof. Said proposal was as follows:

"Following a series of conferences with you, I would be pleased to purchase all of the property owned by you consisting of the following buildings located in Chicago, Illinois, which buildings are now held by your Committee, upon the following terms and conditions:

"(1) That I shall pay for all bonds deposited with you a sum not to exceed \$2,500 in principal amount, 1% of the face

amount of said bonds, which 35% shall include advancements made by the Committee in acquiring title to the premises.

"(2) That I shall pay court costs and title bills incurred in the foreclosure proceedings not to exceed the sum of \$1,050.21.

"(3) That I shall pay Master's fees not to exceed the sum of \$661.45.

"(4) That I shall pay the sum of \$3,500 as fees for the attorneys for the complainant in the foreclosure proceedings involving the above mentioned property.

"(5) That I shall pay a sum not to exceed \$900 as Trustee's fees for services rendered by the Trustee in the foreclosure proceedings involving the above property.

"(6) That I shall pay a sum not to exceed \$6,385.58 for Committee fees, expenses, and disbursements made by the Committee in connection with the Barbara Building.

"(7) That in the event ~~we~~ your bondholders accept the offer, you will assist me in having the foreclosure sale confirmed by which the non-depositing bondholders will secure approximately 12-1/2% of the face amount of their bonds, and that you will turn over the possession and management of the property to my nominee, and will further deliver to us whatever amount of cash may now be on hand with either the Receiver, Trustee, or Clerk of the Court applicable upon such bonds as we may acquire from you or my nominee will own.

"It is my understanding that the total amount of general taxes now due and unpaid against the premises through and including 1935, at full penalties, amount of [to] \$13,358.00 and that the special assessments levied and assessed against the premises are not more than the sum of \$500.00, and my offer to you is conditioned upon the tax situation being as above stated subject, of course, to slight variations as may occur by reason of having failed to figure the penalty down to date of our consummating the proposed offer.

"To evidence my good faith in this matter, I deposit with you herewith a check in the sum of \$1,500.00 which is to be applied on account of the purchase price of the bonds as itemized in my offer submitted herewith in the event the same is accepted within a period of ~~thirty~~ (30) days from the date of this letter, but to be returned to me without obligation whatsoever in the event my offer is not accepted within said thirty (30) days, or such extensions of time thereof as may mutually be agreed upon." (Italics ours.)

Also attached to the complaint as a part thereof was the following letter from the defendant Swanson:

"May 3, 1937.

Mr. Maurice H. Kamm,
33 North LaSalle Street,
Chicago, Illinois.

Dear Sir:

In connection with the proposal you submitted on April 19th for the purchase of the bonds deposited with the Committee on the Barbara Building, please be advised that this has been submitted to

Barbara Wulfsberg, please be advised that this has been submitted to
for the purchase of the bonds deposited with the Committee on the
In connection with the proposal you submitted on April 13, 1951

the bondholders and the time for their acceptance or rejection expired on yesterday, May 7, 1937.

In response to the letter sent out by the Committee under date of April 21st, bondholders whose holdings aggregate \$61,000 voted to accept; bondholders whose holdings aggregated \$8,000 voted to reject. Therefore, at a Committee meeting held this morning, your proposal was accepted.

Will you please take such steps as may be necessary to comply with this proposal?

Yours very truly,
(Signed) E. G. Swanson,
Chairman." (*Italics ours.*)

As heretofore shown defendants' motion to strike the complain was allowed and plaintiff having elected to stand on his complaint the suit was dismissed.

Plaintiff's theory as stated in his brief is that the representations made by defendants were "an inducement to the purchase of the real estate and bonds and that he had a right to rely thereon; that the purchase price was fixed by the proposal and acceptance; that the defendants having supplied the data for the proposal cannot renege and escape liability on the theory that plaintiff should have searched the public records for the tax condition while the proposal was pending acceptance; that the excess in amount of the taxes represents an overpayment of money which can be recovered back in assumpsit as money had and received by defendants to plaintiff's credit or as damages to that extent; that the action is upon the obligation to return the overpayment which in equity and good conscience they should not retain."

Defendants advance the following propositions to sustain the order of the trial court striking plaintiff's complaint and dismissing his suit:

"Plaintiff's offer was made expressly conditional upon the amount of the general taxes and special assessments on the property being approximately as indicated by information which the defendants had compiled through their own investigation of the public records. If upon his own independent examination of the public records plaintiff should discover that the amount of the taxes and special assess-

Condon and the time for their appearance or objection expired on yesterday, May 7, 1917.

In response to the letter sent out by the Committee under date of April 11st, Condon was notified as stated in the letter of April 11st, that his name was being referred to the Committee for consideration of the proposed amendment to the Constitution, and a Committee meeting held this morning, your proposal was accepted.

Will you please make such motion as may be necessary to comply with this proposal?

Yours very truly,

Wm. H. Condon

As heretofore shown defendant's motion to strike the complaint was allowed and plaintiff having elected to stand on his complaint the suit was dismissed.

Plaintiff's theory as stated in his brief is that the representations made by defendant were "an inducement to the purchase of the real estate and bonds and that he had a right to rely thereon; that the purchase price was fixed by the proposal and accepted; that the defendant having applied the data for the proposal cannot reneg and escape liability on the theory that plaintiff should have searched the public records for the tax condition while the taxes represents an overpayment of money which can be recovered back in assumption as money had and received by defendant to plaintiff's credit or as damages to that extent; that the action is upon the obligation to return the overpayment which in equity and good conscience they should not retain."

Defendants advance the following propositions to sustain the order of the trial court striking plaintiff's complaint and dismissing his suit:

"Plaintiff's offer was made expressly conditional upon the amount of the general taxes and special assessments on the property being approximately as indicated by information which the defendant had compiled through their own investigation of the public records. If upon his own independent examination of the public records plaintiff should discover that the amount of the taxes and special assessments was less than the amount of the taxes and special assessments as indicated by the information which the defendant had compiled through their own investigation of the public records, then the offer was made expressly conditional upon the amount of the general taxes and special assessments on the property being approximately as indicated by information which the defendant had compiled through their own investigation of the public records."

ments was in excess of the amounts shown by the records kept by the defendants, plaintiff was given the privilege of withdrawing his offer. Instead of withdrawing his offer, however, plaintiff elected to consummate the contract and cannot now be heard to complain that the amounts of the taxes and special assessments were more or less than shown by the records kept by the defendants. Where information respecting the amount of taxes and special assessments is, as here, equally accessible to both parties and a purchaser fails to use reasonable diligence, the doctrine of caveat emptor applies. In the absence of fiduciary relations or actual fraud, neither of which is charged, the plaintiff is not entitled to and did not rely upon the records kept by the defendants, and no recovery can be had from them.

"Defendants did not warrant the accuracy of the amounts of the taxes and special assessments and plaintiff does not seek to recover from them for breach of warranty. A special contract existed and recovery must be had on that contract and not upon an implied contract.

"The defendants were acting as trustees and agents for the bondholders and there was no meaning or intention under the contract to bind them personally or individually."

While it is true that plaintiff, after his contract of purchase was consummated, was required to pay \$2,446.89 more for delinquent general taxes and special assessments than same were represented and stated to be, and while it is also true that such excess payment of general taxes and special assessments constituted an overpayment of the purchase price of the bonds and property involved, the question is presented as to whether the defendant Swanson, the chairman of the Bondholders Protective Committee and the other two defendants, who were members of that Committee, are personally and individually obligated to return to plaintiff such overpayment on the theory that they have in their possession money belonging to him which in equity and good conscience they should

ments was in excess of the amounts shown by the records kept by the defendants, plaintiff was given the privilege of withdrawing his offer. Instead of withdrawing his offer, however, plaintiff elected to consummate the contract and cannot now be heard to complain that the amounts of the taxes and special assessments were more or less than shown by the records kept by the defendants. Where information respecting the amount of taxes and special assessments is, as here, equally accessible to both parties and a purchaser fails to use reasonable diligence, the doctrine of caveat emptor applies. In the absence of fiduciary relations or actual fraud, neither of which is charged, the plaintiff is not entitled to and did not rely upon the records kept by the defendants, and no recovery can be had.

"Defendants did not warrant the accuracy of the amounts of the taxes and special assessments and plaintiff does not seek to recover from them for breach of warranty. A special contract existed and recovery must be had on that contract and not upon an implied contract.

"The defendants were acting as trustees and agents for the bondholders and there was no meaning or intention under the contract to bind them personally or individually."

While it is true that plaintiff, after his contract of purchase was consummated, was required to pay \$1,000.00 more than the delinquent general taxes and special assessments than were represented and stated to be, and while it is also true that such excess payment of general taxes and special assessments constituted an overpayment of the purchase price of the bonds and property involved, the question is presented as to whether the defendant Swanson, the chairman of the bondholders protective committee and the other two defendants, who were members of that committee, and personally and individually obligated to return to plaintiff such overpayment on the theory that they have in their possession money belonging to him which in equity and good conscience they should

not be permitted to retain.

Plaintiff's complaint did allege that the defendants functioning as the Bondholders Protective Committee "then owned, possessed and held" the bonds in question, as well as the legal title to the premises involved, and that they "had full power and legal authority to sell and dispose thereof in their discretion." However, the power, authority and discretion of the Committee to dispose of the bonds and property were negated by plaintiff's written purchase proposal. It will be noted that his proposal to purchase was not conditioned upon the acceptance of same by defendants but was specifically conditioned in Paragraph 7 thereof "in the event your bondholders accept the offer" and in the next to the last paragraph thereof by the provision that the offer was to be accepted by the bondholders within thirty days and unless so accepted the \$1,500 deposit of earnest money was to be returned.

Thus it clearly appears from the complaint that plaintiff recognized the defendant Swanson, the chairman of the Bondholders Protective Committee, as merely the agent of the bondholders and dealt with him as such. In order to effect a binding obligation plaintiff's proposal required its acceptance by the bondholders and not by the defendant Swanson or the Bondholders Protective Committee. It is obvious from the terms of his proposal that plaintiff would have refused to consummate the contract if his offer had been accepted only by Swanson and the Committee and not by the bondholders themselves. He knew that while the Committee nominally held title to the property and the bonds, the bondholders ~~were the real~~ were the real owners thereof and it was their acceptance of his proposal that plaintiff desired.

This is not a case where a trustee of property contracted concerning same as if it were his own or without disclosing his principal. Neither is it a case where a trustee executed a contract concerning trust property in his own name as "Trustee" without negating his individual liability. Here we have a situation where

not be permitted to retain.

Plaintiff's complaint also alleged that the defendant was-
-tioning as the Bondholders Protective Committee "then owner, pos-
-sessed and held" the bonds in question, as well as the legal title
to the premises involved, and that they "had full power and legal
authority to sell and dispose thereof in their discretion." However,
the power, authority and discretion of the Committee to dispose of
the bonds and property were negatived by Plaintiff's written proposal.
It will be noted that his proposal to purchase was not
conditioned upon the acceptance of same by defendant but was spe-
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holders accept the offer" and in the next to the last paragraph there-
of by the provision that the offer was to be accepted by the bond-
holders within thirty days and unless so accepted the \$1,500 deposit
of earnest money was to be returned.

Thus it clearly appears from the complaint that Plaintiff
recognized the defendant Swanson, the chairman of the Bondholders
Protective Committee, as merely the agent of the bondholders and
dealt with him as such. In order to effect a binding obligation
Plaintiff's proposal required its acceptance by the bondholders and
not by the defendant Swanson or the Bondholders Protective Committee.
It is obvious from the terms of his proposal that Plaintiff would
have refused to consummate the contract if the offer had been accepted
only by Swanson and the Committee and not by the bondholders them-
selves. He knew that while the Committee nominally held title to
the property and the bonds, the bondholders ~~XXXXXXXXXX~~ were the real
owners thereof and it was their acceptance of his proposal that
Plaintiff desired.

This is not a case where a transfer of property was made
concerning same as if it were his own or where Plaintiff was the
principal. Neither is it a case where a trustee executed a contract
concerning trust property in his own name as "trustee" without
negating his individual liability. Here we have a situation where

the plaintiff recognizing the fact that the Committee had no power to bind the bondholders made his proposal not to the Committee but to the bondholders through Swanson, the chairman of the Committee. It is certainly not the law that merely because plaintiff does not know the names of the bondholders that liability should be imposed upon the defendant members of the Committee individually.

The material portion of Swanson's letter to plaintiff advising the latter of the acceptance of his proposal was that "bondholders whose holdings aggregate \$61,000 voted to accept; bondholders whose holdings aggregate \$8,000 voted to reject." This acceptance by the bondholders was the acceptance sought in plaintiff's proposal. Plaintiff stresses the recital in Swanson's letter, "Therefore, at a Committee meeting held this morning, your proposal was accepted" as significant of the acceptance of the offer by defendants. Since, as heretofore stated, plaintiff acknowledged by the terms of his proposal that defendants had no authority to accept his offer of purchase and since he did not seek their acceptance of said offer, the language last above quoted could have no significance other than that the Committee entered in its records the acceptance in accordance with the vote of the bondholders.

There is no question of undisclosed principals in this case. Plaintiff himself in his proposal disclosed the bondholders as the principals with whom he undertook to contract. His proposal was submitted to the defendant Swanson, chairman of the Bondholders Protective Committee, as the agent of the bondholders and he knew Swanson to be such, and he also knew him to be their agent when Swanson wrote the letter of acceptance in behalf of said bondholders. If plaintiff has any right to recover, it is against the bondholders rather than their recognized agent, Swanson, or the other two members of the Committee.

We are impelled to hold that plaintiff's complaint did not state a good cause of action against the defendants and that it was properly stricken by the trial court.

The plaintiff's recognition of the fact that the committee had no power to bind the bondholders made his proposal not to the committee but to the bondholders through Swanson, an attorney of the committee. It is certainly not the law that merely because plaintiff does not know the names of the bondholders that liability should be imposed upon the defendant members of the committee individually.

The material portion of Swanson's letter to plaintiff advising the latter of the acceptance of his proposal was "bondholders whose holdings aggregate \$50,000 voted to accept; bondholders whose holdings aggregate \$5,000 voted to reject." This acceptance by the bondholders was the acceptance sought in plaintiff's proposal. Plaintiff stresses the material in Swanson's letter, "therefore, at a Committee meeting held this morning, your proposal was accepted" as significant of the effect of the vote. Plaintiff acknowledges by the terms of his proposal that defendant had no authority to accept the offer of purchase and since he did not seek their acceptance of said offer, the language last above quoted would have no significance other than that the Committee entered in its records the acceptance in accordance with the vote of the bondholders.

There is no question of undisclosed principals in this case. Plaintiff himself in his proposal disclosed the bondholders as the principals with whom he undertook to contract. His proposal was submitted to the defendant Swanson, chairman of the bondholders' protective committee, as the agent of the bondholders and as such Swanson was to be such, and he also knew him to be their agent from Swanson's letter of acceptance in behalf of said bondholders. It is plaintiff's right to recover, it is incumbent on defendant to show that their recognized agent, Swanson, or the other two members of the Committee.

We are impelled to hold that plaintiff's complaint did not state a good cause of action against the defendants and that it was properly dismissed by the court.

In the view we take of this case we deem it unnecessary to discuss the other points urged.

For the reasons stated herein the judgment order of the Circuit court dismissing this cause is affirmed.

JUDGMENT ORDER AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

in the view of relief aid of

* To discuss the other points of

For the reasons stated herein, the judgment of the

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Received 15 July 1998; accepted 15 October 1998

40793

W. B. CAWARD,
Appellee,

v.
WILK, CLARKE & COMPANY,
Inc., a corporation, FRED L.
WILK and KURT VITTM,
Defendants.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

LLOYD E. WORK, Receiver,
Appellant.

3091A.579

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

A creditor's bill was filed January 25, 1932, by a judgment creditor of Wilk, Clarke & Company. Lloyd E. Work was appointed receiver of the assets of Wilk, Clarke & Company pursuant to the prayer of the bill of complaint. The receiver administered the assets of the company, filed periodic accounts, which were approved, and filed his final account and report on January 31, 1939, which was also approved. Allowances on account of fees for services rendered by the receiver and by his attorney had theretofore been made as the receiver from time to time made current reports. On February 2, 1939, the chancellor entered an order denying the petition of Lloyd E. Work for fees for services rendered by himself as receiver and by his counsel, James Todd, subsequently to February 20, 1937, the date of the receiver's last current report. The receiver appeals from this order.

As already stated Lloyd E. Work was appointed receiver of the assets of Wilk, Clarke & Company on January 26, 1932, on motion of plaintiff who filed the creditor's bill, and on January 27, 1932, the court authorized him to employ James Todd as his counsel.

On the date of the appointment of the receiver the assets of Wilk, Clarke & Company had a book value of \$315,326.25, but the company actually had no net worth. It conducted an investment business dealing largely in stocks, bonds and mortgages. Most of the securities belonging to it had been hypothecated and the

W. B. CARR, JR.
Appellant

W. B. CARR, JR.
Appellant
vs.
W. B. CARR, JR.
Appellant

W. B. CARR, JR.
Appellant

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

A creditor's bill was filed January 25, 1932, by a

judgment creditor of Milk, Clarke & Company, Lloyd M. Work was
appointed receiver of the assets of Milk, Clarke & Company and

assent to the prayer of the bill of complaint. The receiver

administered the assets of the company, filed periodic accounts,
which were approved, and filed his final account and report on

January 31, 1932, which was also approved. Allowances on account
of fees for services rendered by the receiver and by his attorney

had therefore been made as the receiver from time to time made
current reports. On February 2, 1932, the commission entered an

order denying the petition of Lloyd M. Work for fees for services
rendered by himself as receiver and by his counsel, James W. Carr,

subsequently to February 20, 1932, the date of the receiver's
last current report. The receiver appeals from this order.

As already stated Lloyd M. Work was appointed receiver
of the assets of Milk, Clarke & Company on January 25, 1932, on

motion of plaintiff who filed the creditor's bill, and on January
27, 1932, the court authorized him to employ James W. Carr as his

counsel.

On the date of the appointment of the receiver the

assets of Milk, Clarke & Company had a book value of \$12,500.00,
but the company actually had no net worth. It conducted an invest-

ment business dealing largely in stocks, bonds and mortgages, most
of the securities belonging to it had been hypothecated and the

consisted assets largely of commissions due on accounts with brokers, agents and an affiliated company then in receivership. There were some open accounts with clients involving securities, practically all of which were uncollectable. The mortgages held by the company were in default and in the course of the receivership liquidation were converted into doubtful equities. The bank balance of the company was subject to garnishment proceedings and there was due it on account of advances to officers and salesmen in excess of \$14,000. The company had outstanding notes of \$50,000 upon which the interest was in default and there was due clients in excess of \$100,000 on credit balances. There was approximately \$25,000 due on trade and mercantile accounts and for unpaid salaries. The receiver collected the gross sum of \$13,078.39. The total expense of the receivership, including payment of \$4,000 on account of fees of the receiver and his counsel, was \$11,218.44, leaving a cash balance on hand at the time of the receiver's final report of \$1,859.95.

The receiver filed three current reports, September 10, 1932, December 7, 1933 and February 20, 1937, respectively. Upon the approval of the first current report the receiver and his counsel were each allowed a fee of \$1,000 for services rendered. Upon the approval of the second current report the receiver and his counsel were each allowed a fee of \$750. Upon the approval of the third current report on February 20, 1937, an order was entered allowing \$250 on account of receiver's fees and \$250 on account of counsel's fees for the services rendered by the receiver and his counsel up to February 20, 1937.

As heretofore shown, the receiver presented his final account and report on January 31, 1939, and same was approved. With his final report the receiver presented to the court his petition for the allowance of fees for himself and for his attorney, the pertinent portions of which are as follows:

"That during the period of said Receivership your petitioner has collected the gross amount of \$13,075.89, all of which will

constituted a majority of commissions for on accounts with various, names
and an affiliated company from an investigation. When this was
open accounts with clients involving securities, especially all of
which were uncollectible. The mortgages held by the company were
in default and in the course of the receivership liquidation were
converted into doubtful assets. The bank balance of the company
was subject to garnishment proceedings and there was no account
of advances to officers and salaries in excess of \$14,000. The company
had outstanding notes of \$30,000 upon which the interest was in default.
and there was due clients an excess of \$180,000 on credit balances.
There was approximately \$22,000 due on bonds and miscellaneous accounts
and for unpaid salaries. The receiver collected the gross sum of
\$13,078.32. The total expense of the receivership, including pay-
ment of \$4,000 on account of fees of the receiver and his counsel,
was \$11,218.44, leaving a cash balance on hand at the time of the
receiver's final report of \$1,859.88.

The receiver filed three current reports, September 18,
1932, December 7, 1932, and February 20, 1933, respectively. Upon
the approval of the first current report the receiver and his counsel
were each allowed a fee of \$1,000 for services rendered. Upon the
approval of the second current report the receiver and his counsel
were each allowed a fee of \$750. Upon the approval of the third
current report on February 20, 1933, an order was entered allowing
\$250 on account of receiver's fees and \$250 on account of counsel's
fees for the services rendered by the receiver and his counsel up
to February 20, 1933.

As heretofore stated, the receiver, presented the final
account and report on January 12, 1933, and same was approved. In
his final report the receiver presented to the court his petition for
the allowance of fees for himself and for his attorney, his portions
of which are as follows:

"That during the period of said receivership from September
18, 1932, to January 12, 1933, he has collected the gross amount of \$13,078.32, all of which will

more fully appear from his reports now on file in this court; that he now has on hand a cash balance of \$1,859.85.

"Your petitioner further represents that since the date of his last report, February 20, 1937, up to the date of his Final Report and Account, he collected the sum of \$3,075.61; ~~that in~~ collecting said sum of money and winding up the affairs of said receivership he expended 123 -1/2 hours of time, and that his attorney, James Todd, expended 46 hours of time, all of which will more fully appear from the verified statements of your petitioner and of James Todd herewith attached; and your petitioner represents that neither he nor his attorney, James Todd, has received any compensation for the services so rendered.

"Your petitioner further represents that for the services rendered prior to February 20, 1937, neither he nor his attorney, James Todd, have been paid in full; that in winding up the affairs of Wilk, Clarke & Company a great amount of time, completely out of proportion to the amount realized, was spent in view of the fact that Wilk, Clarke & Company was hopelessly insolvent. ***

"Your petitioner further represents that numerous claims were filed in this court; that pursuant to the order and direction of this court your petitioner and his attorney examined said claims, filed answers thereto and defended many of said claims.

"Your petitioner further represents that the court, in making allowance of fees prior to February 20, 1937, took into account the matters hereinabove set forth and allowed substantially less than the reasonable compensation to which your petitioner and his attorney were entitled because there were insufficient funds with which to pay said fees.

"WHEREFORE, the premises considered, your petitioner prays for the entry of an order herein authorizing and directing him, out of the balance of funds in his hands to pay to himself a reasonable amount for his services performed herein and to pay a reasonable amount for the services performed herein by his attorney, James Todd."

were fully appear from his report now on file in this court; that he now has on hand a cash balance of \$1,670.00.

"Your petitioner further represents that since the date of his last report, February 20, 1937, up to the date of his Report and Account, he collected the sum of \$3,077.41; that in

collecting said sum of money and winding up the affairs of said receivership he expended \$13-1/2 hours of time, and that his attorney, James Todd, expended 46 hours of time, all of which will

more fully appear from the verified statements of your petitioner and of James Todd herewith attached; and your petitioner represents that neither he nor his attorney, James Todd, has received any compensation for the services so rendered.

"Your petitioner further represents that for the services rendered prior to February 20, 1937, neither he nor his attorney, James Todd, have been paid in full; that in winding up the affairs of Milk, Clarke & Company a great amount of time, completely out of proportion to the amount realized, was spent in view of the fact

that Milk, Clarke & Company was hopelessly insolvent. ***
"Your petitioner further represents that numerous claims were filed in this court; that pursuant to the order and direction of this court your petitioner and his attorney examined said claims, filed answers thereto and defended many of said claims.

"Your petitioner further represents that the court, in making allowance of fees prior to February 20, 1937, took into account the matters hereinabove set forth and allowed substantially less than the reasonable compensation to which your petitioner and his attorney were entitled because there were insignificant items with which to pay said fees.

"WHEREFORE, the premises considered, your petitioner prays for the entry of an order herein authorizing and directing him, out of the balance of funds in his hands to pay to himself a reasonable amount for his services performed herein and to pay a reasonable amount for the services performed herein by his attorney, James Todd."

The foregoing petition was verified by the receiver and by his attorney, the latter itemizing with particularity the legal services rendered and the amount of time devoted to each item,

The receiver states his theory in his brief as follows:

"The services rendered by the Receiver and his counsel for the period covered by the Receiver's final report, February 20, 1937, to January 31, 1939, should be paid for. During this period the Receiver spent 123 1/2 hours and his counsel spent 46 hours. The sum of three thousand seventy-five dollars and sixty-nine cents was realized for the estate during this period. The appellant contends that the trial court's refusal to allow any compensation for these services was a gross abuse of discretion.

"Since no objection was made by any party to the proceedings to an allowance of fees for the Receiver and his counsel, the appellant is unable to give any opposing theory of the case as provided by the rules. Appellant respectfully submits that the trial court's ruling was without legal basis and purely arbitrary."

No brief other than appellant's has been filed.

In our opinion the chancellor erred in denying the petition of the receiver for the allowance of fees to himself and his attorney for services rendered by them from February 20, 1937, the date of the last current report, to January 31, 1939, the date of his final account and report. The receiver was entitled to the allowance for himself and his attorney of reasonable fees, fairly commensurate with the character, value and extent of the services rendered, but in determining what is reasonable compensation the court should also consider the allowances theretofore made, as well as the net amount of the assets of the receivership.

The order of the Superior court denying the petition of the receiver for the allowance of fees for himself and his attorney is reversed and the cause is remanded with directions that the court determine the fair and reasonable value of the services rendered by the receiver and by his counsel and to allow them compensation in accordance with such determination.

REVERSED AND REMANDED WITH DIRECTIONS.
Friend, P.J., and Scanlan, J., concur.

The foregoing provision was verified by the receiver and by his attorney, the latter informing him that the same was rendered and the amount of time rendered to each claim.

The receiver states his theory in his brief as follows: "The services rendered by the receiver and his counsel for the estate covered by the Receiver's Final report, February 26, 1937, to January 31, 1939, should be paid for. During this period the receiver spent 123 1/2 hours and his counsel spent 48 hours. The sum of three thousand seventy-five dollars and sixty-nine cents was realized for the estate during this period. The appellant contends that the estate's refusal to allow any compensation for these services was a gross abuse of discretion.

"Since no objection was made by any party to the proposed allowance of fees for the Receiver and his counsel, the appellant is unable to give any opposing theory of the estate's position by the rules. Appellant respectfully submits that the estate's ruling was without legal basis and purely arbitrary."

No brief other than appellant's has been filed. In my opinion the Chancellor erred in denying the petition of the receiver for the allowance of fees to himself and his attorney for services rendered by them from February 26, 1937, to the date of the last current report, to January 31, 1939, the date of the final account and report. The receiver was entitled to the allowance for himself and his attorney of reasonable fees, fairly commensurate with the character, value and extent of the services rendered, and in determining what is reasonable compensation the court should also consider the allowances theretofore made, as well as the net amount of the estate of the testator.

The order of the Chancellor should be reversed and the petition of the receiver for the allowance of fees to himself and his attorney be granted and the cause is remanded with directions that the court determine the fair and reasonable value of the services rendered by the receiver and by his counsel and to allow them compensation in accordance with such determination.

REVEREND AND HONORABLE THE CHIEF JUSTICE
P. J. and Associate, J. J. CONNER

41564

ALEX POLATSEK,
Appellant,

v.

MANDEL COHEN,
Appellee.

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

309 I.A. 579²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Alex Polatsek, brought an action for damages against Dr. Manuel Cohen, claiming that the latter shot him without cause or provocation. A trial was had before the court and jury and a verdict was returned by the jury finding defendant guilty and assessing plaintiff's damages at \$2,500. Upon remittitur of \$1,000 judgment was entered in plaintiff's favor for \$1,500. Defendant appealed from this judgment. In Polatsek v. Cohen, 300 Ill. App. 608 (abstract), this court reversed the judgment and remanded the cause for a new trial. Pursuant to our judgment of reversal defendant was awarded judgment for appellate court costs amounting to \$179.70, and execution was issued therefor. Upon remandment of this cause plaintiff on February 15, 1940, moved that it be redocketed and placed upon a trial calendar. On the same day defendant filed a counter-motion supported by affidavits of himself and his attorney to stay the assignment of this cause for trial until plaintiff paid defendant or gave him security for the appellate court costs. Plaintiff's motion to strike defendant's counter-motion and the affidavits filed in support thereof was denied. On the following day, February 16, 1940, the trial court entered the following order:

"On motion of Attorney for defendant, the court having considered the petition of the defendant to stay the proceedings in this cause until the costs of the Appellate Court case appealed from this court be paid or secured and having considered the counter affidavit of plaintiff and there being a full argument of the matter, it is ordered that the proceedings in this cause at bar No. 365 13374 Superior Court of Cook County be stayed until the plaintiff pay to the defendant the costs awarded defendant against the plaintiff in said Appellate Court Case No. 40428 for the First District of Ill. or give security therefor to be approved by this Court. The plaintiff to have 30 days from date hereof to pay said costs or give security therefor, to the entry of which order plaintiff objects."

Appellant
 Appellee

2081A.178

MR. JUSTICE SULLIVAN DELIVERED THE DECISION OF THE COURT.

Plaintiff, Alex Kolaszek, brought an action for damages against Dr. Emanuel Cohen, claiming that the latter had him without cause or provocation. A trial was had before the court and jury and a verdict was returned by the jury finding defendant guilty and assessing plaintiff's damages at \$2,500. Upon remittitur of \$1,000 judgment was entered in plaintiff's favor for \$1,500. Before and appealed from this judgment. In Kolaszek v. Cohen, 300 Ill. App. 603 (abstract), this court reversed the judgment and remanded the cause for a new trial. Pursuant to our judgment of reversal defendant was awarded judgment for appellate court costs amounting to \$172.70, and execution was issued therefor. Upon remittitur of this cause plaintiff on February 12, 1940, moved that it be reheard and placed upon a trial calendar. On the same day defendant filed a counter-motion supported by affidavits of himself and his attorney to stay the assignment of this cause for trial until plaintiff could defendant or gave him security for the appellate court costs. Plaintiff's motion to strike defendant's counter-motion and the affidavits filed in support thereof was denied. On the following day, February 16, 1940, the trial court entered the following order:

"On motion of Attorney for defendant, the court having considered the petition of the defendant to stay the proceedings in this cause until the costs of the appellate court be paid, and having found that the costs be paid or secured and having considered the counter-affidavits of plaintiff and there being a trial judgment of the court, it is ordered that the proceedings in this cause do not stay. Defendant's counter-motion be stayed until the plaintiff pay to the appellate court the costs awarded defendant against the plaintiff. The defendant's counter-motion for the trial court to stay the proceedings be approved by this court. The plaintiff give security therefor to pay said costs or give security to have 30 days from date hereof to pay said costs or give security therefor, to the entry of which order plaintiff objects."

Plaintiff did not file an answer to the foregoing rule nor did he pay the appellate court costs or furnish security for the payment of same. On March 19, 1940, by leave of court plaintiff filed a motion supported by proper affidavits for leave to proceed with his suit as a poor person. On March 28, 1940, defendant moved to dismiss plaintiff's suit because of his failure to comply with the order of February 16, 1940, requiring him to pay the appellate court costs to defendant or to furnish security therefor. March 29, 1940, the court entered the following order:

"This cause coming on to be heard on the motion of Plaintiff, filed March 19, 1940, for leave to continue his suit as a poor person, and on the counter-motion of the defendant for an order to dismiss the suit, for failure on the part of the plaintiff to comply with the order of the Court entered on February 16, 1940, that plaintiff, within thirty days from February 16, 1940, pay or give security for the costs awarded against the plaintiff, in favor of defendant, in the Appellate Court, No. 40428 for the Northern District of Illinois, and it appearing to the Court that plaintiff did not pay said costs or give security for same within said thirty days, and did not and has not complied with said order of the Court, the time to do so expiring on March 18, 1940,

"(1) It is ordered that the motion of the Plaintiff, filed March 19, 1940, to continue his suit as a poor person is denied, the attorneys for the defendant admitting, for the purposes of the action, that the allegations of the plaintiff's petition to sue as a poor person, are true.

"(2) And it is further ordered, on motion of the defendant, that the suit at bar be, and the same is, herewith dismissed, for failure of the plaintiff to comply with the Court's order of February 16, 1940, with costs against the plaintiff, and that execution issue therefor."

This appeal is from the foregoing order.

It clearly appears that plaintiff's failure to comply with the rule of February 16, 1940, ordering him to pay the appellate court costs or furnish security therefor was not willful but that it was due solely to his inability to comply with said rule. This action was not instituted by plaintiff as a poor person but when he made his motion to redocket the case and place it upon the trial calendar after its reversal and remandment by this court he was admittedly a poor person within the intent and meaning of section 5, par. 33, Ill. Rev. Stat. 1937, which provides as follows:

"If any Court shall, before or after the commencement of

Plaintiff did not file an answer to the foregoing complaint nor did he pay the appellate court costs or furnish security for the payment of same. On March 19, 1940, by leave of court Plaintiff filed a motion supported by proper affidavits for leave to proceed with his suit as a poor person. On March 20, 1940, defendant moved to dismiss Plaintiff's suit because of his failure to comply with the order of February 16, 1940, regarding him to pay the appellate court costs or to furnish security therefor. March 29, 1940, the court entered the following order:

"This cause coming on to be heard on the motion of Plaintiff, filed March 19, 1940, for leave to proceed with his suit as a poor person, and on the motion of the defendant to dismiss the suit, for failure to pay the appellate court costs or to furnish security therefor, the court entered on February 16, 1940, an order to comply with the order of the court entered on February 16, 1940, for the defendant, in the Appellate Court, No. 40023 for the defendant to pay the appellate court costs or to furnish security therefor, and it is ordered that the defendant comply with said order of the court, and did not and has not complied with said order of the court, the time to do so expiring on March 19, 1940.

"(1) It is ordered that the motion of the Plaintiff, filed March 19, 1940, to continue his suit as a poor person is denied, the attorneys for the defendant submitting for the purpose of the action, that the allegations of the Plaintiff's petition to

"(2) And it is further ordered, on motion of the defendant, that the suit at bar be, and the same is hereby dismissed, for failure of the Plaintiff to comply with the court's order of February 16, 1940, with costs against the Plaintiff, and that execution issue therefor."

This appeal is from the foregoing order.
It clearly appears that Plaintiff's failure to comply with the rule of February 16, 1940, ordering him to pay the appellate court costs or furnish security therefor was not willful but that it was due solely to his inability to comply with said rule. This action was not instituted by Plaintiff as a poor person but when he made his motion to rehear the case and place it upon the trial calendar after its reversal and remandment by this court he was admittedly a poor person within the intent and meaning of section 53, Ill. Rev. Stat. 1937, which provides as follows:
"If any Court shall, before or after the commencement of

any suit, be satisfied that the Plaintiff or Defendant is a poor person, and unable to prosecute or defend suit and pay the costs and expenses thereof, the Court may, in its discretion, permit him to commence and prosecute his action, or defend suit, as a poor person; and, thereupon, such person shall have all the necessary writs, processes, appearances and proceedings, as in other cases, without fees or charges ***."

It must be remembered that plaintiff secured a verdict and judgment against defendant upon the original trial of this cause and that such judgment was reversed and remanded primarily because of what we considered prejudicial conduct on the part of the trial judge. It was part of our judgment order that the case be retried. In fairness and justice may plaintiff be deprived of a retrial because he has become a "poor person" and cannot pay the appellate court judgment for costs or furnish security therefor? Defendant attempts to differentiate between payment of such costs and furnishing security therefor and asserts that even though plaintiff was not able to pay such costs that did not excuse him from furnishing security for their payment. The judgment for costs is an absolute liability and it is fair to assume that if plaintiff could have procured some person to furnish security for the appellate court costs, that same person would have paid the costs in his behalf.

By the express terms of the foregoing statute, whether a person shall be permitted to prosecute a suit without the payment of costs is a matter of discretion with the court. That discretion, however, is not a mere arbitrary power to grant or withhold relief but is a sound legal discretion, and, as in all other cases of like character, an abuse of that discretion is an error which may be corrected on appeal. (Tracy v. Bible, 181 Ill. 331.) A cross-motion for leave to prosecute as a poor person may be interposed to a motion for security for costs. (Illinois Central Railroad Co. v. Latimer, 128 Ill. 163; Consolidated Coal Company v. Gruber, 185 id. 584.) The question therefore for our determination is whether the trial court abused its discretion, under the facts shown in plaintiff's affidavit and the stipulation of the parties that plaintiff was in fact a poor

any suit, be satisfied that the plaintiff or defendant is a poor person, and unable to prosecute or defend suit and pay the costs and expenses thereof, the Court may, in its discretion, permit him to commence and prosecute his action or defend suit, as a poor person; and, thereupon, such person shall pay all the necessary writs, processes, appearances and proceedings, as in other cases, without lesser charges.

It must be remembered that plaintiff's recovery is voidable and judgment against defendant upon the original trial of the cause and that such judgment was reversed and remanded primarily because of what we considered prejudicial conduct on the part of the trial judge. It was part of our judgment order that the case be retried in fairness and justice may plaintiff be deprived of a retrial because he has become a "poor person" and cannot pay the appellate court judgment for costs of retrial? We have no doubt that attempts to differentiate between payment of such costs and retrial security therefor and awards that even though plaintiff was not able to pay such costs that did not excuse him from furnishing the security for their payment. The judgment for costs is an absolute liability and it is fair to assume that if plaintiff could have procured some person to furnish security for the appellate court costs, that same person would have paid the costs in his behalf.

By the express terms of the foregoing statute, whether a person shall be permitted to prosecute a suit without the payment of costs is a matter of discretion with the court. That discretion, however, is not a mere arbitrary power to grant or withhold relief but is a sound legal discretion, and, as in all other cases of like character, an abuse of that discretion is an error which may be corrected on appeal. (Tracy v. Bishop, 101 Ill. 391.) A cross-motion for leave to prosecute as a poor person may be interposed to a motion for security for costs. (Illinois General Statutes, Sec. 123.) The question therefore for our determination is whether the trial court abused its discretion, under the facts shown in plaintiff's affidavit and the stipulation of the parties that plaintiff was in fact a poor

person, in refusing to allow him to prosecute as a poor person.

Inasmuch as the sufficiency of the affidavits filed by plaintiff in support of his motion to be permitted to continue with the prosecution of his action as a poor person is not questioned and his inability to pay the judgment for costs or furnish security therefor is admitted, we think that the trial court abused the discretion with which it was clothed when it denied plaintiff's motion for leave to continue with the prosecution of his case in forma pauperis.

For the reasons stated herein the judgment order of the Superior court which denied plaintiff's motion "to continue his suit as a poor person" and dismissed the suit at plaintiff's costs is reversed and the cause is remanded with directions to allow plaintiff's motion to continue with the prosecution of his action as a poor person and to grant his motion to redocket the case and place it upon the trial calendar.

JUDGMENT ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Friend, P. J., and Scanlan, J., concur.

person, in refusing to allow him to prosecute as a poor person.

Plaintiff in support of his motion to be admitted to continue with the prosecution of his action as a poor person is not prepared and his inability to pay the judgment has been on several occasions theretofore admitted, as shown that the trial court should exercise discretion with which it was satisfied when it denied plaintiff's motion for leave to continue with the prosecution of his case is

Form suggested.

For the reasons stated herein the judgment given of the Superior court which denied plaintiff's motion "to continue his trial as a poor person" and dismissed the suit of plaintiff's case is reversed and the cause is remanded with directions to allow plaintiff's motion to continue with the prosecution of his action as a poor person and to grant his motion to redress the same and place it upon the trial calendar.

FORWARDED BY THE COURT

Friend, P. J., and Benjamin, J., concur.

41592

ERNEST CROSBY, beneficiary of
OCTAVIA CROSBY, deceased,
Appellee,

v.

JACKSON FUNERAL SYSTEM ASSOCIATION,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

309 I.A. 580

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought against the Jackson Funeral System Association by plaintiff, Ernest Crosby, as the beneficiary of Octavia Crosby, deceased, who, during her lifetime, was a member and certificate holder of said association. A trial by the court without a jury resulted in a finding and judgment against defendant for \$225. This appeal followed. No brief has been filed by plaintiff.

The membership certificate issued to the deceased by defendant contained the following provisions: "This Certificate and the application therefor, a copy of which is attached hereto, shall constitute the entire contract with the member. The application for membership and conditions set forth on reverse side hereof, are made a part of this contract and are binding upon the member." Upon the application for membership signed by the deceased appeared the following question and her answer thereto: "13. Are you in good and vigorous health now? Yes." The concluding paragraph of decedent's application just above her signature contained this statement: "I hereby represent that the foregoing statements and answers are complete, true and correct and I understand and agree that this application shall be the basis and form a part of the certificate hereby applied for and that such certificate shall not be in force unless and until the same is issued and received during my lifetime."

The membership certificate was issued to the deceased on June 19, 1939, pursuant to her application of June 14, 1939, and without any medical examination. She entered the Illinois State

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 DEPARTMENT OF JUSTICE
 DIVISION OF INVESTIGATION
 MAY 15 1939

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 DEPARTMENT OF JUSTICE
 DIVISION OF INVESTIGATION
 MAY 15 1939

MR. JAMES EARL RAY, JR., 1000 1/2 SOUTH MAIN STREET, ST. LOUIS, MISSOURI.

This action was brought against the defendant.

System Association by Plaintiff, James Earl Ray, Jr., of St. Louis, Missouri, and a number of other persons, who, during the time, were a part of the same and certificate holder of said association. A copy of the same without a jury returned in a finding and judgment against the defendant for \$250. This appeal followed. No other case was filed by Plaintiff.

The membership certificate issued to the defendant by

defendant contained the following provisions: "This certificate and the application therefor, a copy of which is attached hereto, shall constitute the entire contract between the defendant and the applicant for membership and conditions and terms of membership shall be made a part of this contract and the applicant shall be bound by the same." Upon the application for membership, defendant executed and signed the following certificate and the same was received by the defendant on or about June 15, 1939. Are you in good and virtuous health? Yes. Do you understand and agree that this certificate shall be the basis and form a part of the certificate issued to you and that such certificate shall not be in force unless and until the same is issued and received during my lifetime?"

The membership certificate was issued to the defendant on June 15, 1939, pursuant to her application of June 14, 1939, and the same was received during my lifetime.

Hospital at Dunning on July 8, 1939, just twenty-two days after she made her application for membership.

Plaintiff, Ernest Crosby, testified that he was the husband of the deceased; that his wife first became ill in July, 1939; that "all at once she happened to get sick;" that they had been married fourteen years and five children were born of their marriage; that he had never "obtained the service of a doctor for her" prior to July, 1939, and that she had never been "hospitalized;" that in July, 1939, he took her to a Dr. Griffin, who examined her; and that then "I took her *** to Wood Street Hospital *** when I got over there she went in, was examined, found that she was paralyzed from syphilis, and sent her to Dunning."

Mrs. Crosby died at the State Hospital at Dunning on August 15, 1939, and her death certificate showed that the immediate cause of her death was "Syphilitic Meningo Encephalitis due to Syphilis."

Dr. Dale Beverly testifying as an expert witness stated that syphilitic meningo encephalitis "is a form of tertiary lues known as a Syphilitic action of the brain and brain substance *** the third stage, final stage of syphilis *** the third stage of syphilis is rarely ever reached before six months and usually manifests itself anywhere from ten to fifteen years after the initial lesion *** certainly not less than a year;" and that in his opinion the deceased "was afflicted with the disease not less than one year and more likely she had the disease several years."

The certificate of membership issued to the deceased by the defendant is in the nature of an insurance contract and it has been repeatedly held that a false representation of fact in an application for a policy of insurance which materially affects either the acceptance of the risk or the hazard assumed, when made intentionally and knowingly, avoids a contract of insurance. (Western and Southern Life Ins. Co. v. Tomason, 358 Ill. 496; Joseph v. New York Life Insurance Co., 219 Ill. 452; Thompson v. State Mutual Life Assurance Co., 305 Ill. 255; McMahon v. Continental Assurance Co., 308 Ill.

Hospital at Lansing on July 2, 1939, and January-two days later.

she made her application for membership.

Ministry, Ernest Groby, testified that he was the husband

of the deceased; that his wife first became ill in July, 1939; that

"all at once she happened to get sick; that they had been married

fourteen years and five children were born of their marriage; that

he had never "obtained the service of a doctor for her" prior to

July, 1939, and that she had never been "hospitalized;" that in

July, 1939, he took her to a Dr. Griffin, who examined her; and that

then "I took her *** to Wood Street Hospital *** when I got over there

she went in, was examined, found that she was paralyzed from syphilis,

and sent her to Lansing."

Mrs. Groby died at the State Hospital at Lansing on August

12, 1939, and her death certificate showed that the immediate cause of

her death was "syphilitic meningitis due to syphilis."

Dr. Dais Beverly testifying as an expert witness stated

that syphilitic meningitis "is a form of tertiary late

known as a syphilitic lesion of the brain and brain substance ***

the third stage, final stage of syphilis *** the third stage of

syphilis is rarely ever reached before six months and usually many-

lesions itself anywhere from ten to fifteen years after the initial

lesion *** certainly not less than a year;" and that in his opinion

the deceased "was afflicted with the disease not less than ten years

and more likely she had the disease several years."

The certificate of membership issued to the deceased by the

defendant is in the nature of an insurance contract and it has been

repeatedly held that a false representation of fact in an application

for a policy of insurance which is material to the insurer is a breach

of the risk of the contract assumed, when made intentionally and

knowingly, avoids a contract of insurance. (Insurance and Insurance)

This case, as stated, is the case of the deceased.

Insurance Co., 115 Ill. 401; Insurance Co., 115 Ill. 401; Insurance Co.,

115 Ill. 401; Insurance Co., 115 Ill. 401; Insurance Co., 115 Ill. 401.

App. 27 (advance sheets No. 1),).

Did the deceased in her application for membership intentionally and knowingly misrepresent to defendant that she was "in good and vigorous health?" Under the facts and circumstances of this case the conclusion is inescapable that the deceased must have known that she was afflicted with syphilis when she signed the application for membership in defendant association on June 14, 1939. When she entered the Illinois State Hospital at Dunning on July 6, 1939, she was "paralyzed from syphilis" according to plaintiff. This was her condition only twenty-two days after she executed her application. The immediate cause of her death about five weeks later was syphilis in its final and most tragic stage. It had affected "her brain and brain substance." Syphilis in its final stage is a progressive disease and if she was so afflicted that she was "paralyzed" from it on July 6, 1939, and the immediate cause of her death on August 15, 1935, was "Syphilitic Meningo Encephalitis," in our opinion it was impossible for her not to have known that she was suffering from syphilis when she signed her application on June 14, 1939. It follows that if she was afflicted with syphilis in its final stage on that date, she was not "in good and vigorous health."

We are impelled to hold that the decedent intentionally and knowingly misrepresented the condition of her health to induce the defendant association to issue its certificate of membership to her and that therefore she was guilty of intentional fraud and said certificate is void.

For the reasons stated herein the judgment of the Municipal court of Chicago is reversed.

JUDGMENT REVERSED.

Friend, P. J., and Scanlan, J., concur.

Appx 27 (Advance sheets 60, 61, 62)

Did the deceased in her application for membership in the
Internationally and knowingly misrepresented the condition of her mind as being
"good and vigorous health?" Under the facts and circumstances of
this case the conclusion is inescapable that the deceased must
have known that she was afflicted with syphilis when she signed
the application for membership in defendant's association on June 15,
1939. When she entered the Illinois State Hospital at Joliet on
July 6, 1939, she was "paralyzed from syphilis" according to plain-
tiff. This was her condition only twenty-two days after she executed
her application. The immediate cause of her death about three weeks
later was syphilis in its final and most tragic stage. It had
affected "her brain and brain substance," "syphilis in its final
stage is a progressive disease and it was so afflicted that
she was "paralyzed" from it on July 6, 1939, and the immediate
cause of her death on August 17, 1939, was "syphilitic meningitis."
Encephalitis," in our opinion it was impossible for her not to
have known that she was suffering from syphilis when she signed
her application on June 15, 1939. It follows that if she was
afflicted with syphilis in its final stage on that date, she was
not "in good and vigorous health."

We are impelled to hold that the deceased intentionally
and knowingly misrepresented the condition of her mind as being
the defendant's association to issue its certificate of membership
to her and that therefore she was guilty of intentional fraud and
said certificate is void.

For the reasons stated herein the judgment of the Circuit
Court of Chicago is reversed.

THOMAS J. BRYAN, JR.

Attorney at Law, Chicago, Ill.

41626

EDWARD J. GRIFFIN,
Appellee,

v.

HERTZ DRIVURSELF STATIONS, Inc.,
a corporation, and BIRCK-FELLINGER
CORPORATION, a corporation,
Appellants.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

30914.580²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment for \$300 entered against the defendants, Hertz Drivursel Stations, Inc., and Birck-Fellinger Corporation, in an action brought by plaintiff, Edward J. Griffin, for personal injuries and damages to his automobile. The case was tried by the court without a jury. The suit was originally brought against the Hertz Drivursel Stations, Inc., alone. Later August Verlinden and the Birck-Fellinger Corporation were named additional defendants. No service was had on Verlinden.

Plaintiff was injured and his automobile damaged on March 5, 1938, about 8:30 p.m., while he was driving south on Morgan street in the city of Chicago. His car was struck by a truck which was being driven by August Verlinden in a westerly direction on 72nd street across Morgan street. This truck belonged to Hertz Drivursel Stations, Inc. (sometimes hereinafter for convenience referred to as Hertz), and had been rented to the Birck-Fellinger Corporation.

Verlinden testified that he was a painter employed by Hertz Drivursel Stations, Inc.; that he was instructed by his immediate superior, Mr. George Grant, on the afternoon of March 5, 1938, to take the truck, which was brand new and just out of the paint shop, directly to the Hertz garage at 63rd place and Galsted streets, where the rest of the Birck-Fellinger fleet was kept; that he left the Hertz shop at 9 W. Kinzie street about 4:45 p.m.; that he had made this trip many times before and that ordinarily it should not require more than forty-five minutes; that previously

STATE OF ILLINOIS

IN SENATE

REPORT OF THE

COMMISSIONERS OF THE LAND OFFICE

AND THE LAND DELIVERY AND OFFICE OF THE COMMISSION

This appeal seeks to reverse a judgment for \$500 entered

against the defendant, North Driveway Station, Inc., and against

Telling Corporation, in an action brought by plaintiff, Edward

J. Griffin, for personal injuries and damages to his automobile.

The case was tried by the court without a jury. The suit was

originally brought against the defendant, North Driveway Station, Inc.,

alone. Later August Telling and the defendant, Telling Corporation,

were named additional defendants. No answer was filed on behalf of

plaintiff was injured and his automobile damaged on March

2, 1938, about 8:30 p.m., while he was driving south on Logan

street in the city of Chicago. His car was struck by a truck

which was being driven by August Telling in a westerly direction

on 72nd street across Logan street. This truck belonged to North

Driveway Station, Inc., (hereinafter referred to as North).

North was referred to as North, and had been rented to the North-Telling

Corporation.

Telling testified that he was a partner, employed by

North Driveway Station, Inc.; that he was accompanied by his

immediate superior, Mr. George Grant, on the afternoon of March 2,

1938, to take the truck, which was brand new and just out of the

paint shop, directly to the North garage at 52nd street and 72nd

streets, where the rest of the North-Telling fleet was being kept.

He left the North shop at 9 a.m. about about 4:45 p.m.; and

he had made this trip many times before and thus ordinarily it

would not require more than forty-five minutes; that previously

when he had made this trip, he usually drove south on State street to 63rd street, west on 63rd street to Halsted street and thence to the Hertz Garage at 63rd place and Halsted street; that on the occasion in question, instead of proceeding direct to the garage, he drove the truck to his mother's home at 7119 South Parnell avenue, which was eight or nine blocks south of 63rd place, where the garage was located, and about three or four blocks east of Halsted street; that he had dinner at his mother's home and stayed there until shortly before 8:30 p.m.; that when he left his mother's home he "turned west into 72nd street with the intention of going to my home and picking up my wife and then going to a show at 67th and Halsted and in the meantime delivering the truck;" that he was crossing Morgan street at 72nd street when the accident happened, Morgan street being about nine or ten blocks west of Parnell avenue and three or four blocks west of Halsted street; and that he had never delivered any trucks to Birck-Pellinger and had never been employed by that company.

George Grant testified that he was superintendent of maintenance of the Hertz plant at 9 West Kinzie street; that he had ordered Verlinden on the afternoon in question to take the truck directly to the company's station and garage at 728 W. 63rd place; that to go to said garage from the company's plant at Kinzie street did not necessitate going beyond 63rd place; that he had never given Verlinden and did not on that evening give him the privilege of keeping the truck out and using it on a mission of his own; and that this was "the first time he [Verlinden] had ever taken a truck or a car away from where he should have taken it to."

That the negligence of Verlinden, the driver of the truck, was responsible for the accident and the damages suffered by plaintiff is not questioned.

Defendants' contend "that at the time of the occurrence August Verlinden was not acting as agent or servant of either of

when he had made this trip, he usually drove north on 6th street to 6th street, west on 6th street to 11th street and thence to the North Garage at 6th place and 11th street; that on the occasion in question, instead of proceeding direct to the garage, he drove the truck to his mother's home at 7th South Franklin Avenue, which was eight or nine blocks north of 6th place, where the garage was located, and about three or four blocks east of 11th street; that he had dinner at his mother's home and stayed there until shortly before 8:30 p.m.; that when he left his mother's home he "turned west into 7th street with the intention of going to my home and picking up my wife and then going to a show at 6th and 11th and in the meantime delivering the truck;" that he was crossing Morgan street at 7th street when the accident happened, Morgan street being about nine or ten blocks west of Franklin Avenue and three or four blocks west of 11th street; and that he had never delivered any trucks to Birch-Pollinger and had never been employed by that company.

George Grant testified that he was superintendent of maintenance of the North plant at 9 West Kinzie street; that he had ordered Verlinde on the afternoon in question to take the truck directly to the company's station and garage at 7th and 6th place; that he did not recall the company's location at that time; that he did not necessitate going beyond 6th place; that he had never given Verlinde and did not on that evening give him the address of his home and taking it on a mission of his own; and that this was "the first time he [Verlinde] had ever taken a truck or a car away from where he should have taken it to."

That the negligence of Verlinde, the driver of the truck, was responsible for the accident and the damages suffered by plaintiff is not questioned.

Defendants' contentions that at the time of the occurrence August Verlinde was not acting as agent or servant of either of

them in the driving of the truck, but was entirely out of the scope of his employment with the Hertz Drivurself Stations, Inc., and was engaged on a mission of his own."

Plaintiff's theory is that "ownership implies possession and control of a vehicle and makes out a prima facie case for plaintiff in this action;" that "a slight deviation from a direct route does not constitute such a turning aside from pursuing the business of his employment as to absolve the master from liability;" and that "whether or not the driver of the truck was the servant of the defendants at the time of the accident was a question of fact for the court."

The presumption that the Birck-Fellinger Corporation was the owner of the truck or that the truck was in its possession and control at the time of the accident because the name "Birck-Fellinger" was painted on it was entirely overcome by the evidence that the truck was owned by Hertz Drivurself Stations, Inc., and was being driven by an employee of the latter company. It was conclusively shown that, although the Birck-Fellinger Corporation had leased or rented the truck from the Hertz company, it had not as yet been delivered to it and that Verlinden had never been in its employ. It is impossible to conceive of any theory under which the defendant Birck-Fellinger Corporation could be held liable.

Over defendants' objection plaintiff was permitted to testify that after the accident he had a conversation with Verlinden, the driver of the truck, a portion of which is as follows: "He says 'I am a painter over at 9 W. Kinzie Street for the Hertz Rent Yourself *** I was delivering this car because it was late and everybody had gone home that was driving *** I am enroute to 95th,' - and I believe he said Ashland Avenue, Birck-Fellinger shop over that way." Verlinden denied that he had any such conversation with plaintiff.

Plaintiff's testimony as to the foregoing conversation with Verlinden was clearly inadmissible. It formed no part of the res gestae since it did not in anywise tend to show how the collision occurred. If it was offered on the theory that it would show whose

them in the driving of the truck, and the fact that the scope of his employment with the defendant was limited to the scope of his employment with the defendant, and was engaged on a mission of his own.

Plaintiff's theory is that "concurrent liability possession and control of a vehicle and makes out a prima facie case for plaintiff's theory." But "concurrent liability possession and control" does not necessitate such a finding, and the business of his employment as to involve the matter from liability," and that "whether or not the driver of the truck was the servant of the defendant at the time of the accident was a question of fact for the court."

The presumption that the Black-Turning Corporation was the owner of the truck on that the truck was in its possession and control at the time of the accident because the name "Black-Turning" was painted on it was easily overcome by the evidence that the truck was owned by Hertz Drive-It Stations, Inc., and was being driven by an employee of the latter company. It was conclusively shown that, although the Black-Turning Corporation had leased or rented the truck from the Hertz company, it had not as yet been delivered to it and that Verlinde had never been in its employ. It is impossible to conceive of any theory under which the defendant and Black-Turning Corporation could be held liable.

Over defendant's objection, plaintiff was permitted to testify that after the accident he had a conversation with Verlinde, the driver of the truck, a portion of which is as follows: "He says 'I am a painter over at 2 S. Kansas Street for the Hertz Rent Corporation.' *** I was delivering this car because it was late and everybody had gone home that was driving and I am anxious to get it, - and I believe he said Kansas Avenue, Black-Turning shop over that way." Verlinde denied that he had any such conversation with plaintiff.

Plaintiff's testimony as to the foregoing conversation with Verlinde was clearly inadmissible. It formed no part of the case stated since it did not in anywise tend to show how the collision occurred. It it was offered on the theory that it would show that

agent Verlinden was, it was incompetent for that purpose since the relation of principal and agent cannot be proven by the alleged declarations of an agent. (Martin v. Purek, 227 Ill. App. 379; Sommerio v. Prudential Ins. Co., 289 Ill. App. 520.)

This brings us to the question as to whether the relationship of master and servant existed between the defendant Hertz Drivurself Stations, Inc., and the driver of the truck at the time of the accident. There is no denial of the testimony of Verlinden and Grant that, when the former left the plant of the Hertz company at 9 W. Kinzie street at 4:45 p.m. on March 5, 1938, he was told to deliver the truck direct to the Hertz garage, which was located at 63rd place and Halsted street, and that this trip should not ordinarily take him over three quarters of an hour. In other words, if Verlinden had followed the instructions given him the truck should have been delivered to the garage about 5:30 p.m. However, instead of making the delivery as directed and without any permission or right to do so, Verlinden drove the truck to his mother's home, which was eight or nine blocks south and four or five blocks east of the Hertz garage at 63rd place and Halsted street. Neither is it denied that he remained at his mother's home until nearly 8:30 p.m. that evening, that at the time of the accident he was on his way to his own home at 66th and Morgan streets to pick up his wife and that he intended to take her to a show and then deliver the truck to the garage.

It has been repeatedly held that such a departure as Verlinden made from his master's business and from the scope of his employment suspended the relation of master and servant. In Cohen v. Fayette, 233 Ill. App. 458, the facts closely parallel the facts here. In that case the driver of the defendant's delivery truck was through with his work at 6 p.m. and the accident happened at 7:30 p.m. When he finished his work, instead of immediately returning the truck to the garage where it was ordinarily kept and in the face of specific instructions not to use the truck after 6 p.m. for any purpose whatsoever, the driver stated that he drove to his home "to

agent Verlander was, if the investigation for the purpose of the
relation of principal and agent was to be made by the agent
investigation at the agent's residence, the agent's residence
was at 111, 113, 115, 117, 119, 121, 123, 125, 127, 129, 131, 133, 135, 137, 139, 141, 143, 145, 147, 149, 151, 153, 155, 157, 159, 161, 163, 165, 167, 169, 171, 173, 175, 177, 179, 181, 183, 185, 187, 189, 191, 193, 195, 197, 199, 201, 203, 205, 207, 209, 211, 213, 215, 217, 219, 221, 223, 225, 227, 229, 231, 233, 235, 237, 239, 241, 243, 245, 247, 249, 251, 253, 255, 257, 259, 261, 263, 265, 267, 269, 271, 273, 275, 277, 279, 281, 283, 285, 287, 289, 291, 293, 295, 297, 299, 301, 303, 305, 307, 309, 311, 313, 315, 317, 319, 321, 323, 325, 327, 329, 331, 333, 335, 337, 339, 341, 343, 345, 347, 349, 351, 353, 355, 357, 359, 361, 363, 365, 367, 369, 371, 373, 375, 377, 379, 381, 383, 385, 387, 389, 391, 393, 395, 397, 399, 401, 403, 405, 407, 409, 411, 413, 415, 417, 419, 421, 423, 425, 427, 429, 431, 433, 435, 437, 439, 441, 443, 445, 447, 449, 451, 453, 455, 457, 459, 461, 463, 465, 467, 469, 471, 473, 475, 477, 479, 481, 483, 485, 487, 489, 491, 493, 495, 497, 499, 501, 503, 505, 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eat," that he did this without permission and contrary to the general instructions of the defendant, that he remained at home over an hour and that about 7 o'clock he started back to the garage with the truck when the accident occurred. There the court said at pp. 462, 463 and 465:

"Upon the question of law involved in defendant's contention, the rule is well settled that where an employer is sought to be held liable for the consequences of the negligence of his employee, and the employer denies that the relation of master and servant existed at the time of the accident, the plaintiff must show by a preponderance of the evidence not only that the person at fault was employed by the defendant, but that the injury was inflicted while the servant was engaged in the master's business and was acting within the scope of his employment. 'Outside of the scope of his employment the servant is as much a stranger to his master as any third person, and an act of the servant not done in the execution of services for which he was engaged cannot be regarded as the act of the master. If the servant steps aside from his master's business for some purpose wholly disconnected with his employment the relation of master and servant is suspended. The act of the servant during such interval is not to be charged to his master. This doctrine is established by substantially all the authorities.' (Johanson v. Johnston Printing Co., 263 Ill. 236.)

*** there are many cases, constituting what is believed to be the greater weight of authority, which hold that where a servant, without the express or implied consent of the master, takes his master's vehicle upon a journey of his own for a purpose wholly disconnected from the work which he is hired to do, the relation of master and servant is suspended during the whole of such journey, that is, that such relation is not resumed until such unauthorized journey is ended; and if a third party sustains an injury through the servant's negligence while the servant is returning the vehicle to the place from which he has so taken it, the master is not liable."

(To the same effect are Lohr v. Barkmann Cartage Co., 335 Ill. 335; Craig v. Tucker, 264 Ill. App. 521; Rogel v. 1324 No. Clark St. Bldg. Corp., 278 Ill. App. 286.)

The cases cited by plaintiff dealing with a slight deviation from a direct route have no application here. At the time of the accident and for several hours prior thereto Verlinden, the driver of the truck, was not acting within the scope of his employment and was not engaged in the business of the Hertz Drivervself Stations, Inc. He had stepped aside from same and had embarked upon a mission of his own without the knowledge or consent of his employer. There was no question of fact in the trial of this case as to the suspension of the relation of master and servant

at the time and place of the accident since the competent evidence in the record bearing on the suspension of such relationship was uncontroverted.

We are impelled to hold that the defendant Hertz Drive-
rless Stations, Inc., is not chargeable with the negligent conduct of
Verlinden, the driver of the truck, at the time of the accident,
and since we have heretofore shown that no liability attached to
the defendant Birck-Tellingier Corporation, the judgment will
necessarily have to be reversed as to both defendants.

For the reasons stated herein the judgment of the Municipal
court is reversed.

JUDGMENT REVERSED.

Friend, P. J., and Scanlan, J., concur.

...

at the time and place of the accident. It is not possible to determine in the record bearing on the accident at least one witness.

...

It was implied to have been the driver of the truck, who was driving on the highway, who was responsible for the accident.

Verlin, the driver of the truck, at the time of the accident, and since we have no other evidence to show that he was driving at the time of the accident, we must assume that he was the driver.

...

necessarily have to be reversed at the time of the accident.

For the reasons stated herein the judgment of the court is reversed.

...

...

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09 Ill. App.
Adv. Op. 14
June 1, 1941

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of February, in
the year of our Lord one thousand nine hundred and forty-one,
within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

309 I.A. 647

BE IT REMEMBERED, that afterwards, to-wit: On
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

THESE RESEARCHES HAVE BEEN SUPPORTED BY THE

... ..

... ..

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

Figure 1. The effect of the concentration of the *Agrobacterium* suspension on the transformation efficiency of *Agrobacterium* strains.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1940

Ella Schumacher,)	
)	
Appellee,)	Appeal from Circuit
)	
vs.)	Court of DuPage County.
)	
City of Naperville,)	
)	
Appellant,)	

Dove, J.

Appellee recovered a judgment of \$2500 against appellant in the circuit court of DuPage county as damages on account of personal injuries alleged to be the result of falling in the dark over a stake in a parkway between the sidewalk and curbing of a street in the city of Naperville, on January 20, 1937. Appellant urges as grounds for reversal a want of due care and contributory negligence on the part of appellee; that the city was not guilty of any negligence; error in refusing to direct a verdict for appellant and in giving instructions for appellee; and that the verdict is against the manifest weight of the evidence, and is excessive.

Webster street runs north and south, intersecting Franklin Street which runs east and west. Appellee lives on the West side of Webster Street south of the intersection in the house next to the corner house. There is a parkway twelve feet wide along the south side of Franklin Street between the sidewalk and the curb. In November, 1936, the city planted some young trees along or near the center line

1. The first group of people who are interested in the study of the history of the world are the historians. They are people who study the past and try to understand what happened and why it happened. They use a variety of sources, including books, documents, and artifacts, to reconstruct the past. They also try to understand the people who lived in the past and how they thought and felt. Historians are interested in the history of the world because it helps them to understand the present and the future.

1. evc5

of the parkway, one of which was placed about twenty-five feet east of Webster Street. It was about fifteen feet high and was supported by three guy wires attached to stakes driven into the parkway to prevent root disturbance. The stakes and wires were removed about August or September, 1937, after the ground settled. The testimony on the part of the city is that one of the stakes was placed to the north, one to the southwest and one to the southeast, and that the latter two were from three to four feet north of the sidewalk. The testimony on the part of appellee is that the so-called southeast stake was in fact placed south of the tree within fifteen to eighteen inches of the sidewalk and was moved southeast after the accident. This is the stake over which appellee fell. The testimony as to its location at the time of the accident is in irreconcilable conflict. Appellee admitted having seen from the door of her home the planting and the installation of the stakes and wires.

On the morning of the accident it was dark and raining hard. She saw water and ice on the streets from her window by the light of the corner street lamp. She put on her coat and rubbers and left home to procure her daughter's rubbers at North College about five blocks away, so that the daughter could go to the College. She testified that everything was covered with ice; that the street lights had been turned off, and it was very dark; that she carried an umbrella and walked on the parkway along Webster Street to the corner, proceeded east on the sidewalk on Franklin Street about twenty-five feet and stepped off the sidewalk because it was so slippery she was in danger of falling, and walking on the grass was easier; that as she stepped off the walk she fell over the stake mentioned; that she had to walk carefully because it was almost impossible

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many as to its location at the time of the accident is the house in
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easily; that he was about the house of the house of the house of the house and
house; that the house of the house of the house of the house of the house

to stand up; that she looked to see where she was going but it was too dark to see and she had to tell by her feet. There is no testimony which tends to show she knew how far north of the sidewalk the stake was located. She testified she did not recall ever seeing the tree or wires after they were installed or of walking on the south side of Franklin Street; that she worked daily and did not get home until late at night. It is the well settled law of this State, that, where one knows of a defect in a sidewalk or street and walks thereon, his doing so is not negligence per se, as a matter of law, but is a circumstance for the consideration of the jury. (City of Mattoon vs. Faller, 217 Ill. 273; Wallace v. City of Farmington, 231 id. 232.) Under these circumstances the question of appellee's due care and contributory negligence was properly submitted to the jury.

Trees, hydrants, poles and wires are customarily located in portions of a street not required for travel. Such obstructions do not constitute a violation of the city's duty toward the public if the street remains reasonably safe for those using it in vehicles or on foot and exercising ordinary care. But the question arises in each case whether the obstruction is of such character that a person using the street or the sidewalk in the ordinary way and using ordinary care for his own safety is exposed to an unnecessary and unreasonable risk. This is usually a question of fact, but it may become a question of law where the obstruction is of such a character that reasonable minds cannot differ about it. It is negligence for

one whose duty is to use reasonable care to make conditions safe, to provide conditions which are unsafe under circumstances which ought to be anticipated. What is not unusual is to be anticipated. (Brennan v. City of Streator, 256 Ill. 468.) It is not an unusual thing for persons to walk on parkways when sidewalks are slippery from ice. Whether the stake was so located as to create an unnecessary and unreasonable risk to persons travelling the street under conditions that should be anticipated by the city is a question that we cannot say all reasonable minds would agree upon, and was properly submitted to the jury.

At the request of appellee the court gave the jury the following instruction: "The court instructs the jury that if they believe from the evidence and under the instructions of the court, that the defendant, City of Naperville, was guilty of negligence as charged in the complaint, and that the plaintiff, Ella Schumacher, was free from contributory negligence, then they should find the defendant guilty." The giving of an instruction which refers the jury to the complaint to determine the issues has been repeatedly condemned. (Lerette v. Director General of Railroads, 306 Ill. 348; Laughlin v. Hopkinson, 292 id. 80.) The burden of proof is on the plaintiff in a personal injury case to prove that he was in the exercise of due care at the time of the accident. (Dee v. City of Peru, 343 Ill. 36; Wilson v. Illinois Central Railroad Co., 109 Ill. App. 542; Manusik v. Hanlon, 258 id. 114.) The question of appellee's due care and contributory negligence is closely contested and the instructions on that subject should be free from substantial error. The instruction complained of directs a verdict. Such an instruction must embrace all the facts

essential to such a verdict, and a failure to so do is fatal, and cannot be cured by other instructions. (Cromer v. Borders Coal Co., 246 Ill. 451; Illinois Iron and Metal Co. v. Weber, 196 id. 526; Brewster v. Rockford Public Service Co., 257 Ill. App. 182.) The instruction here makes no mention of the time when appellee must have been exercising due care or be free from contributory negligence, and thus omits an essential element of the right to recover. Giving the instruction was reversible error. This makes it unnecessary to discuss the claims that the verdict is against the manifest weight of the evidence and is excessive. The judgment is reversed and the cause is remanded to the circuit court for a new trial.

Reversed and Remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of February, in
the year of our Lord one thousand nine hundred and forty-one,
within and for the Second District of the State of Illinois:

Present -- the HON. FRED G. WOLFE, Presiding Justice
HON. BLAINE HUFFMAN, Justice
HON. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

309 I.A. 648¹

BE IT REMEMBERED, that afterwards, to-wit: On
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

THE UNIVERSITY OF CHICAGO

DEPARTMENT OF THE HISTORY OF ARTS
AND ARCHITECTURE
AND THE HISTORY OF LITERATURE

THE UNIVERSITY OF CHICAGO
DEPARTMENT OF THE HISTORY OF ARTS
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AND THE HISTORY OF LITERATURE

THE UNIVERSITY OF CHICAGO
DEPARTMENT OF THE HISTORY OF ARTS
AND ARCHITECTURE
AND THE HISTORY OF LITERATURE

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, 1941.

THEMESA CHASE,

APPELLEE,

vs.

BLAINE H. TOMLIN,

APPELLANT.

APPEAL FROM THE CIRCUIT COURT
OF PEORIA COUNTY.

HUFFMAN, J.

This action is brought by appellee under the Guest Statute to recover for personal injuries received while riding in appellant's automobile. Such injuries were received when appellant's car left the pavement and crashed into a telephone pole at the side of the road. Trial resulted in a verdict for appellee plaintiff in the sum of \$3250, and the defendant below brings this appeal from judgment rendered on the verdict.

Appellee was married but was separated from her husband and had been keeping company with appellant for about six months. She was employed as waitress in a tavern in Peoria. The defendant was married and was living with his family, and engaged in operating a grocery store. On the day in question, which was August 17, 1939, the parties met at the tavern where appellee was employed. This was at about 2:30 in the afternoon.

Appellee claims that appellant asked her to go with him to the State Fair at Springfield. Appellant claims that appellee

asked him to take her to the Fair. Be this as it may, the parties left the tavern in appellant's automobile and proceeded to appellee's rooms for the purpose of her obtaining clothing. It was raining and the pavement was wet. The accident happened just south of Pekin between 5:30 and 6:00 o'clock in the afternoon. Appellee claims that appellant was driving his car recklessly and at a high rate of speed; that she had remonstrated with him several times about his driving in such manner; that she told him unless he drove carefully, she would not ride with him, and that he said he would so drive; that he ignored her request and his promise, and immediately prior to the accident was driving the car between sixty-five and seventy miles an hour. Appellant claims that appellee said nothing to him about how he should drive the car or made any complaint of the manner in which he was driving the car. He denies that he was driving recklessly or at a high rate of speed, and claims that at the time of the accident, his speed was about forty-five miles per hour. His version of the matter is, that as he was proceeding south from Pekin on the paved highway, there was an automobile ahead of him and being operated in the same direction in which he was proceeding; that he did not become aware of the presence of this car upon the highway until it was immediately in front of him; that he thereupon applied his brakes and his car skidded across the pavement to the opposite side, left the road, and hit the pole.

Appellee was very seriously injured. She was removed to a hospital in Pekin by ambulance, where she remained for two weeks, then taken by ambulance to a hospital in Peoria where she remained for eight weeks. There is no controversy concerning her injuries, and without detailing same, it may be said

they were extremely serious and have left her permanently impaired. Her pelvic bone was broken in five places, and her bladder sustained a tear. Error is assigned that the verdict is excessive, but the court cannot concur in this.

During the period of time appellee was in the hospital in Peoria, two attorneys, who were employed in the office of counsel for appellant, called upon her with reference to the accident. There they talked with her. A written statement was prepared incorporating what she then said about the accident. When this was later submitted to her, she declined to sign it. The statement was submitted in evidence and contained contradictory statements to those made by appellee upon the trial of this cause, in that she stated the speed of the car to have been about forty or forty-five miles per hour; that she had not complained of appellant's driving, and that all she could remember was, that the car skidded and ran into the telephone pole. It further appears in such statement that she expressed herself to the effect that she did not consider appellant responsible for the accident. On the trial of the cause, she stated that her answers to the questions asked her in the hospital by the attorneys were made at the instance of appellant, who had told her that he did not want any publicity, that everything would be taken care of, and that when she left the hospital, he would get her an apartment and a girl to look after her and to do the work until she was able to be up and around, and that he told her to state that he was driving carefully. It appears from appellant's evidence that he did visit appellee in the hospital at Peoria, as claimed by her. He says he does not remember if he had such conversation with her as claimed.

The jury had a fair opportunity to hear and observe the

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witnesses and it was within their province to determine the credibility to be accorded to the testimony. They accepted appellee's explanation of the statements she made at the hospital. Appellant complains with respect to the introduction of certain Xray pictures, but we do not consider such evidence to constitute reversible error. The testimony of the doctors is undisputed with respect to her injuries, and considering the extent thereof, the verdict cannot be considered as excessive or the result of passion and prejudice.

Appellee offered two instructions. Appellant assigns error as to both of said instructions. It appears that twenty instructions were given by the court on behalf of appellant which fully and clearly covered every phase of the case. It is our conclusion that the jury was fairly instructed and could not have been misled by anything contained in appellee's two instructions. This case was solely one of fact insofar as appellant's liability was concerned. After a thorough study of the record, and the points and suggestions urged by appellant, we are of the opinion that he received a fair trial. It was the function of the jury to determine the questions of fact.

Finding no reversible error in the record, the judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of February, in
the year of our Lord one thousand nine hundred and forty-one,
within and for the Second District of the State of Illinois:

Present -- the HON. FRED G. WOLFE, Presiding Justice

HON. BLAINE HUFFMAN, Justice

HON. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

3091A:648²

BE IT REMEMBERED, that afterwards, to-wit: On
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

THE UNITED STATES OF AMERICA

IN SENATE
January 10, 1917

REPORT OF THE

COMMISSIONER OF THE

GENERAL LAND OFFICE

FOR THE YEAR 1916

WASHINGTON, D. C.

GOVERNMENT PRINTING OFFICE: 1917. 100-100000-1

THE UNITED STATES OF AMERICA

IN SENATE

January 10, 1917

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, 1941.

ALBERT O. ENGBERT, Executor of
the last Will and Testament of
MARY ARNOLD, Deceased, ET AL.,

APPELLANTS,

vs.

SAMUEL MARTZ,

APPELLEE.

}
}
}
}
} APPEAL FROM THE CIRCUIT COURT
OF STEPHENSON COUNTY.
}

HUFFMAN, J.

Appellee and his wife were indebted to Albert J. Arnold and Mary Arnold, his wife, in the sum of \$3000, evidenced by a note. On March 1, 1938, appellee paid to Mr. and Mrs. Arnold \$1000, upon the principal. A new note was drawn and executed in the sum of \$2000, with interest at five per cent. On March 1, 1939, appellee went to the home of Mr. and Mrs. Arnold in Freeport, where he paid \$100, the interest due, and claims to have paid at the same time the balance of the principal, \$2000. The interest was paid by check. Appellee claims to have paid the \$2000, in currency. He states that Mr. and Mrs. Arnold were present when he paid the money.

Mr. Arnold died on March 24, 1939. Mrs. Arnold died on November 28, 1939. Among their papers and effects was found appellee's note in the sum of \$2000. Suit was brought thereon by appellants. The cause was heard by the court without jury,

TO: DIRECTOR, FBI
FROM: SAC, NEW YORK (100-100000)
SUBJECT: [REDACTED]

and judgment rendered in favor of the defendant, appellee.

Upon the trial, appellee was called by appellants under Section 60 of the Civil Practice Act and examined regarding the matter in controversy. It appears from his testimony that on about March 1, 1938, he paid Mr. Arnold \$1000, on the principal, together with interest, and that a new note was prepared in the sum of \$2000, bearing interest at five per cent; that Mr. Arnold gave him the old note, and that he gave Mr. Arnold the new note. Appellee further testified that on March 1, 1939, he went to the home of Mr. Arnold where he gave him a check for the interest due, in the sum of \$100, and delivered to him at that time \$2000, in currency; that Mrs. Arnold was present and witnessed the transaction; that it was about ten or eleven o'clock in the morning; that Mr. Arnold took the check and the money, and asked appellee if he was going down town, to which, appellee replied that he was; that Mr. Arnold asked him if he could ride down town with him, and that appellee replied that he could; that appellee asked for his note; that Mr. Arnold took the check and the money and retired to his room for fifteen or twenty minutes, where he changed clothes; that upon his return, he advised appellee he was unable to find the note just then but that he wrote on the back of the check, "Paid in full;" that he took Mr. Arnold down town and let him out of the car by the bank and later took him home. Appellee states that the money with which he paid the note was acquired from his farming operations, consisting of receipts from the sale of hogs and cattle, crops harvested, the sale of milk, and money from life insurance received upon the death of his wife, which occurred during the summer of 1938. He states that he had saved up over \$2000 in cash which he kept about his residence. He testifies that

following his payment of the note on March 1, he returned to the home of Mr. Arnold on March 4th, to see if he had found the note, and that he was again advised the note had not been found, and that at this time Mr. Arnold said, "I will fix it so they will never bother you," and wrote and delivered to appellee a receipt which reads: "Treeport, Illinois, March 4, 1939. Samuel Martz note of \$2000. is paid in full and forever. Albert J. Arnold." Appellee states that Mrs. Arnold was present at all of his visits at the Arnold home.

Evidence of Mr. Schell, a banker where Mr. Arnold did business and who negotiated the loan in the first instance, is to the effect that the receipt held by appellee is entirely in the handwriting of Mr. Arnold. Appellee testified in his own behalf with respect to his sources of revenue during the period of time in question, for the purpose of establishing his ability to have accumulated the money with which he paid the note. It appears that he farmed about two hundred forty acres. The appellants attempted to disprove appellee's ability in this regard, by his bank balances during the period in question. However, it appears that when a search of the premises of Mr. Arnold was made, slightly over \$1400 in currency was found hidden and secreted about the house.

Appellants also endeavored to establish that Mr. Arnold lacked the capacity to transact business on March 1st, and 4th, at the times of appellee's visits to his home. The court had opportunity to see and hear the witnesses in this regard and we are not disposed to disturb the judgment on that ground. It was developed by appellants in their examination of appellee under said Section 60, that the note had been paid in full together with interest due, and the cancelled check for the interest as well as Mr. Arnold's receipt for the payment of

the principal of \$2000, were in evidence. We find nothing to disprove that the writing was that of Mr. Arnold.

The judgment is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand nine
hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of February, in the year of our Lord one thousand nine hundred and forty-one, within and for the Second District of the State of Illinois:

Present -- the HON. FRED G. WOLFE, Presiding Justice
HON. BLAINE HUFFMAN, Justice
HON. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

309 I.A. 649

BE IT REMEMBERED, that afterwards, to-wit: On the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

THE HISTORY OF THE UNITED STATES

OF THE UNITED STATES OF AMERICA, FROM THE FIRST SETTLEMENTS TO THE PRESENT TIME. BY JAMES M. SMITH, LL.D., OF THE UNIVERSITY OF CHICAGO.

NEW YORK: PUBLISHED BY J. B. LIPPINCOTT & CO., 15 N. 2ND ST.

PHILADELPHIA: 1888.

Entered as Second-Class Matter, July 1, 1879.

Postpaid.

Copyright, 1888, by J. B. Lippincott & Co.

Printed by J. B. Lippincott & Co., Philadelphia, Pa.

THE HISTORY OF THE UNITED STATES, FROM THE FIRST SETTLEMENTS TO THE PRESENT TIME. BY JAMES M. SMITH, LL.D., OF THE UNIVERSITY OF CHICAGO.

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, 1941

CHARLES CONKRITE,)	
)	
APPELLANT,)	APPEAL FROM THE CIRCUIT COURT
)	
vs.)	OF LEE COUNTY.
)	
WARD T. MILLER,)	
)	
APPELLEE.)	

HUFFMAN, J.

This is a suit by appellant against appellee based upon an alleged assault which occurred on July 15, 1938. Trial by jury resulted in a verdict for the defendant. The plaintiff below brings this appeal from judgment rendered thereon.

Appellee was the sheriff of Lee County. Appellant's son, at the time in question, was in jail awaiting removal to the State Farm at Vandalia. Appellant went to the jail to see his son. It is apparent from the evidence that the appellant had been drinking and was somewhat loud and boisterous in his conduct. It further appears that appellant had words with the sheriff, which the testimony of the attendants at the jail shows to have been heated and very uncomplimentary. As appellant was starting to leave the jail, he made certain remarks to the sheriff, of a personal character. The sheriff stepped to the porch of the jail and ordered appellant to leave. The sheriff claims that appellant then made a sudden move toward

STATE OF NEW YORK
IN SENATE
JANUARY 11, 1911.

REPORT OF THE
COMMISSIONERS OF THE LAND OFFICE
IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE
JANUARY 11, 1911.

ALBANY: J. B. LIPPINCOTT & CO., PRINTERS.
1911.

THE LAND OFFICE OF THE STATE OF NEW YORK
HAS THE HONOR TO ACKNOWLEDGE THE RECEIPT OF
A RESOLUTION PASSED BY THE SENATE
JANUARY 11, 1911, RELATIVE TO THE
LANDS BELONGING TO THE STATE.

IN RESPONSE TO THE SAME, THE COMMISSIONERS
OF THE LAND OFFICE HAVE THE HONOR TO
SUBMIT THE FOLLOWING REPORT.

THE LANDS BELONGING TO THE STATE OF NEW YORK
ARE EXTENSIVE AND ARE LOCATED IN
VARIOUS PARTS OF THE STATE. THEY
INCLUDE LANDS BELONGING TO THE STATE
AND LANDS BELONGING TO THE PEOPLE OF THE STATE.

THE LANDS BELONGING TO THE STATE OF NEW YORK
ARE EXTENSIVE AND ARE LOCATED IN
VARIOUS PARTS OF THE STATE. THEY
INCLUDE LANDS BELONGING TO THE STATE
AND LANDS BELONGING TO THE PEOPLE OF THE STATE.

him as if to strike him, and that he thereupon pushed appellant, who fell off the side of the porch into a flower garden, scratching the side of his face on a wire netting which was around the flower garden, and which was some ten or fifteen inches in height. Testimony of one of the deputy sheriffs is, that he told appellant he had been drinking and to go on home; that he took him by the arm and started him toward the outside door; that the next thing he saw of appellant, the sheriff was helping him up from the flower garden, and that he secured a towel and wiped a spot of blood from the side of appellant's face.

Appellant claims that appellee struck him in the "jaw" with his fist which caused him to fall off the porch of the jail into a flower bed; that when he arose, he was bleeding from the mouth, the top of his head and his jaw; that he made no attempt to strike appellee and had not threatened to do so; and that following the blow, he had a terrific pain in his head. He claims that because of such blow, he suffered a tear in a blood vessel back of his eye which has resulted in an impaired vision in that eye.

It appears from evidence submitted by appellant, that he is suffering from a condition of an abnormal opening between an artery and a vein of the left eye which has affected his vision in that eye. The medical testimony introduced in regard thereto is to the effect that such a condition could have been caused by a blow. The evidence shows the trouble to be located within the skull and back of the eye and at a place called the "brain box;" that there is an anatomical relation between the vein and the artery at such point, and that at such point the artery runs for a short distance within the walls of the vein, and that this is the only place where this trouble could occur in connection with the eye.

him as it to strike him, and that he immediately gained equilibrium, who fell off the side of the house into a flower garden, somewhat
ing the side of the house on a wire hanging which was secured to
flower garden, and which was some 100 to 150 feet in length, it being
testimony of one of the legions available to, that he had applied
and he had been working and he had been; that he had also by
the arm and started the arm of the house; that the arm
thing he saw of applicant, the applicant was hanging from the
the flower garden, and that he saw a woman, and that a foot
of blood from the side of applicant's face.
Applicant claimed that applicant struck him in the head with
his fist which caused him to fall off the porch of the house
a flower bed; that when he arose, he was bleeding from the head,
the top of his head and the fact that he had no memory of seeing
applicant and had not talked to him; that the applicant, the
blow, he had a terrible pain in his head. He stated that he was
of each blow, he sustained a pain in a blood vessel back of the
eye which has resulted in an impaired vision in that eye.
It appears from evidence submitted by applicant, that he
is suffering from a condition of an abnormal opening between
an artery and a vein of the left eye which has affected his
vision in that eye. The medical testimony introduced in support
thereof is to the effect that such a condition could have been
caused by a blow. The evidence does not indicate that applicant
within the skull and that he was not in any way injured by
"While it is true that it is not possible to determine the
time and the extent of such injury, and that it is not possible to
extend time for a short distance within the walls of the vein,
and that this is the only place where this condition could occur
in connection with the eye.

It appears from the medical testimony introduced that the condition from which appellant is suffering might result from any one of a number of causes, such as an injury, infection, or from systemic causes. Dr. Stackhouse, who dressed appellant's face where it had been scratched by the wire, immediately after the affair, states that it was a superficial wound. There is no evidence from him, or from Dr. Murphy or Dr. McNichols, who examined appellant two or three days after the difficulty, that there were any bruises or marks on or about his left eye or the left side of his face or head to indicate that he had received a blow. Appellant was employed by the Chicago & Northwestern Railroad Company as a brakeman. The testimony of a freight conductor, who had been in the employ of this railroad company for thirty-two years, is, that appellant was a member of his train crew and had been working regularly since November, 1938. The testimony of Dr. Nyglod discloses that he is assistant surgeon for the above railroad company, which position he has held for fifteen years; that he was in charge of the examination of employees of that railroad; that he made an examination of appellant in October, 1938; and that such examination disclosed normal sight in both eyes.

Appellee states that he had known appellant about two years prior to the day in question; that appellant had made certain threats to him with respect to his son who was then in jail; that appellant's conduct at the jail was disorderly and abusive; that as he was leaving the jail, he turned and again resumed his improper conduct; that appellee went to the porch of the jail and ordered appellant "to get out;" that appellant then made a quick move at him as if to strike him, and that he pushed appellant from him, whereupon he fell off

the side of the porch into the flower bed; that he tried to catch him when he saw he was about to fall, but missed him; that his face was scratched by the wire which was around the flower bed; that appellant said to him, "I didn't think you would do it;" and that he replied, "Do you think I would let you hit me;" that deputy Richardson secured a towel and removed a few drops of blood from appellant's cheek where it had been scratched by the wire; and that there was no other blood on or about his face.

Appellant assigns four reasons for reversal, the first being, that the verdict is contrary to the law and the evidence; second, that it was the result of misunderstanding of the evidence and the instructions; third, that the court gave erroneous instructions for defendant; and fourth, that the verdict is the result of passion and prejudice.

We have examined with care the points and suggestions in support thereof urged by appellant for reversal, but from the record in this case, we are of the opinion that he received a fair trial.

It appears that appellee had twice been elected sheriff of Lee county, and at the time of the trial was county treasurer of said county. It further fairly appears that appellant was quarrelsome and abusive on the day in question. The evidence is in dispute in some respects. However, we believe the case was fairly submitted to the jury, who as well as the trial court had the opportunity to hear and observe the witnesses. This court does not feel justified in holding that the verdict is against the manifest weight of the evidence. The judgment is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

7655

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of February, in
the year of our Lord one thousand nine hundred and forty-one,
within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

309 I.A. 649²

BE IT REMEMBERED, that afterwards, to-wit: On
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, viz:

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, 1941

CHARLENE DRUMMOND, Administratrix of the Estate of VERL O. DRUMMOND, Deceased,	}	APPEAL FROM THE CIRCUIT COURT OF LEE COUNTY.
APPELLANT,		
vs.	}	
HARRY GLEIM and ELSIE GLEIM,		
APPELLEES.	}	

HUFFMAN, J.

This is a suit by appellant to recover for the alleged wrongful death of her intestate. The action grows out of a collision between an automobile being driven by the deceased and one being driven by Elsie Gleim, wife of Harry Gleim. The collision occurred about ten o'clock in the forenoon of September 12, 1939, at the intersection of two country roads. Trial resulted in a verdict for appellees (defendants below), and plaintiff below brings this appeal.

The deceased was engaged in the business of operating a silo filler with which he filled silos for farmers about the country. On the day in question, he had his equipment on the farm of Mr. Bert Vogeler. During the progress of the work, some part of the machinery broke, thereby causing a shut-down. The deceased together with two of his employees, Vernon and Gale Sanders, started in the deceased's automobile for Moline

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to secure a new part to replace the broken part of the machinery. Moline was about eighty miles from the Vogeler farm. Just prior to the collision, the deceased was traveling north and Mrs. Gleim was traveling west toward the intersection in question. The front of deceased's car struck the left side of the car driven by Mrs. Gleim. The car driven by Mr. Drummond was over turned, killing him and injuring his two employees, who were with him.

Appellant urges that the verdict is contrary to the law and the evidence; that Mrs. Gleim was negligent, thus causing the accident; and that the court admitted improper evidence regarding a statement made by the deceased with respect to his contemplated trip to Moline for repairs to his silo equipment.

Vernon Sanders was called as a witness for appellant but stated that although he was riding in the car with the deceased, he does not remember anything about the collision. Gale Sanders was called as a witness for appellees. He stated his age to be forty-three years; that he was working for Mr. Drummond on the day in question; that when the filling machine broke down, they took the broken part, which was a gear, and started for Moline to get a new one; that they were in the deceased's Ford Truck; that he had driven automobiles for about twenty-two years; that he was sitting on the right side of the car and was looking north; that the deceased was traveling sixty miles an hour at the time of the accident and on the left hand side of the road, going north. He states that the Gleim car was coming from the east, going west; that he does not know the speed of that car; and that he saw it coming at the corner. He states that the car in which he was riding hit the Gleim car. Mrs. Gleim was engaged in taking some corn over to her mother's farm to grind for feed. Evidence of a deputy sheriff, who went to the scene of the accident, is to the

to secure a new pair of wheels and motion gear in the workshop.
Hollins was about thirty years of age, single, and of
to the collision, the deceased was travelling north on the
was travelling west toward the intersection in question. The driver
of deceased's car crossed the path of the car driven by
Hollins. The car driven by the deceased was over twenty minutes
him and inflicted his two compound, the compound
Hollins upon the victim in the manner of the
the ordinance; what law. Hollins was travelling
accident; and that the cause of the accident was the
ing a statement made by the deceased with reference to the
placed trip of Hollins for a period of the same accident.
Hollins was travelling north on the
was travelling north on the
was called at a witness and Hollins. He testified that he
fourty-five years; that he was married, and was one of the
for it resulting in the death of the deceased, and that
took the broken parts, which was a gear, and brought the witness
yet a few days; that they were in the workshop in the
he had driver's license for about twenty years; that he was
sitting on the right side of the car and was looking toward
the deceased was travelling north on the road at the time of the
accident and on the left hand side of the road, north, south, and
Hollins that the deceased was looking toward the deceased
that he had not been the speed at that time; that he was
looking at the moment. He stated that the car in which he was
traveling at the time of the accident was a 1924 model, and
that he was not looking at the car at the time of the accident.

effect that the Gleim car was hit on the left rear wheel and fender; that the deceased's car was over turned, but that the Gleim car was not. This evidence appears to be sustained by the exhibits consisting of photographs. There were no eye witnesses to the accident except the parties involved therein. Therefore, the testimony of Gale Sanders is the only evidence concerning the actual occurrence of the collision.

Appellant objects to evidence of conversation between Mr. Vogeler and the deceased at the time the machine broke down. It seems that they were in a hurry to get the work done, and that the deceased insisted that he would go to Moline and procure the needed repairs and get the silo filled if he had to travel ninety miles an hour and work all night to fill it. This conversation in no way went to establish the speed at which the deceased was traveling at the time of his death but merely consisted of an expression on his part to render prompt service to Mr. Vogler with respect to the work to be done, and only indicated his desire and intention to shorten the period of delay as much as possible. Mr. Vogeler stated to Mr. Drummond that they would not be able to do any more work that day and would have to finish it on the morrow. We do not believe that this evidence was prejudicial to appellant such as to constitute reversible error in this case. The deceased did not state that he expected to drive or was going to drive ninety miles per hour. The speed at which his employee Sanders stated he was traveling at the time of the accident is not an unusual speed for an open road. However, it does not appear that the deceased reduced the speed of his car when approaching this intersection. The evidence indicates that for a short distance east of the intersection and on the south side of the highway being traveled by Mrs. Gleim, there were trees

and shrubs which tended to obstruct the view of one approaching the intersection from the south. While there is no positive testimony as to the speed at which Mrs. Gleim was traveling, yet such as was introduced on behalf of appellant by persons whom she met along the road before reaching the intersection, would indicate that the speed of her car in no way approached that of the deceased's.

No reference is made to any instructions given by the court and none are included in the Abstract, therefore it is to be presumed that no dispute existed between the parties as to the statute relative to such a situation as we find existing herein.

The accident was a most regrettable one and doubly so since the deceased met his death while in an attempt to repair his machinery and perform his work without undue delay to Mr. Vogeler. However, the case was one of fact for a jury and we do not consider the verdict to be against the weight of the evidence. The function of the jury was to weigh the facts. We are unable to say that the appellant did not have a fair trial or that there is not sufficient evidence upon which the jury could base it's verdict.

The judgment is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

III. Unpublished Opinions

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